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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 845.

ANDREW ANTONI, PLAINTIFF IN ERROR,

vs.

SAMUEL C. GREENHOW, TREASURER OF THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED MAY 18, 1882.

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1 In the Supreme Court of Appeals of Virginia.

*Petition for Mandamus.*

Antoni
*vs.*
Greenhow, Treasurer.

VIRGINIA:

2 At a Supreme Court of Appeals held at the State Court-house in the city of Richmond on Thursday, April 27th, 1872.

Be it remembered, that heretofore, to wit, at a Supreme Court of Appeals held at the State Court-house in the city of Richmond on Tuesday, the 28th of March, 1882—

Came Andrew Antoni by his counsel, and presented to the court his petition for a mandamus against Samuel C. Greenhow, treasurer of the city of Richmond and, as such, collector of the taxes due to the State of Virginia in said city, which petition is in the words and figures following, to wit:

3 *Petition for Mandamus.*

Antoni
*vs.*
Greenhow, Treasurer.

To the Honorable the Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, Andrew Antoni, would respectfully represent that he is a citizen of Richmond, Virginia, and, as such, that he owes to the State of Virginia taxes to the amount of three dollars and fifteen cents.

Your petitioner would further show that he owns property in said city.

Your petitioner would further show that on the twentieth day of March, in the year 1882, he tendered to the treasurer of the city of Richmond, who is by law charged with the duty of collecting the taxes due to the State of Virginia in the city of Richmond, a coupon for three dollars, which was due and past maturity, which coupon was cut from a bond of the State of Virginia issued under the provisions of the act of Assembly passed March 30th, 1871, commonly known as the Funding Act—to be found in the Acts of 1870-'71, chapter 282, page 378—and fifteen cents in lawful money of the United States, making three dollars and fifteen cents together, in payment of the taxes due by him to the State of Virginia; but the said treasurer of the city of Richmond refused to receive the said coupon and money in discharge of the amount of taxes due by your petitioner.

Your petitioner would further show that the said coupon was cut from the State of Virginia's bond issued under the provisions of the aforesaid act, for one hundred dollars, numbered 6498, and the same is coupon number 21 of the coupons attached to said bond, and the same sets out the following language upon its face, to wit:

"Receivable at and after maturity for all taxes, debts, and demands due the State.

The Commonwealth of Virginia will pay the bearer three dollars, interest due 1st January, 1882, on bond No. 6498.

GEORGE RYE,
*Treasurer of the Commonwealth of Virginia.*

Coupon No. 21."

4 Your petitioner would further show that the State of Virginia issued and put out her aforesaid bond with the aforesaid coupon attached thereto, and that she thereby entered into a contract with the person to whom she issued said bond, and with whoever might be the bearer of said coupon, that she would receive the same in payment of taxes due to her.

Your petitioner would further show that by intent of the act aforesaid, and the Constitution of the United States, said coupon is receivable at its face value, together with the money offered by him, in liquidation and settlement of said claims of the State against him for taxes, and that by the refusal of the aforesaid treasurer to receive the same in full payment and discharge of what he owes for taxes as aforesaid, he is injured and aggrieved; and he therefore prays this honorable court that a writ of mandamus nisi may be issued to Samuel C. Greenhow, treasurer of the city of Richmond, commanding him to receive from your petitioner the coupon and money aforesaid in full payment and discharge of the said taxes due by him.

WILLIAM L. ROYAL,
*Attorney for Andrew Antoni, Petitioner.*

STATE OF VIRGINIA,
*City of Richmond,* } to wit:

This day Andrew Antoni personally appeared before me, Alfred Sheild, clerk of the Circuit Court of the city of Richmond, in my said city, and made oath that the allegations of the within petition are true.

Given under my hand this 20th day of March, 1882.

ALFRED SHEILD,
*Clerk of the Circuit Court city of Richmond.*

And thereupon the said Supreme Court of Appeals entered an order, which is as follows:

Upon the petition of Andrew Antoni, representing that he owes the State of Virginia taxes to the amount of three dollars and fifteen

cents; that he is a citizen of and owns property in the city of Richmond; that on the 20th of March, 1882, he tendered to the treasurer of the city of Richmond, who is by law charged with the duty of collecting the taxes due to the State of Virginia in the city of Richmond, a coupon for three dollars which was due and past maturity, which coupon was cut from a bond of the State of Virginia, issued under the provisions of the act of Assembly passed March 30th, 1871, commonly known as the funding act, and fifteen cents in lawful money of the United States, making three dollars and fifteen cents, in payment of the taxes due by him to the State of Virginia; that the said treasurer of the city of Richmond refused to receive the said coupon and money in discharge of the amount of taxes due by him; that said coupon was cut from the State of Virginia's bond, issued under the provisions of the aforesaid act, for one hundred dollars, numbered 6498, and the same is coupon number 21 of the coupons attached to the said bond;—the said petitioner prays that a writ of *mandamus nisi* may be issued to Samuel C. Greenhow, treasurer of the city of Richmond, commanding him to receive the coupon and money aforesaid in full payment and discharge of the said taxes due by the petitioner: It is ordered, That the said Samuel C. Greenhow, treasurer of the city of Richmond and collector as aforesaid, after being previously served with a copy of this order, do appear here on the 30th day of March, 1882, and show cause, if any he can, why the Commonwealth's writ of mandamus should not be awarded the said petitioner, to command the said treasurer and collector as aforesaid to receive the said matured coupon and money in payment and satisfaction of said taxes due from said petitioner to the State of Virginia as aforesaid.

Upon a copy of which order is the following endorsement:

"In the clerk's office of the Supreme Court of Appeals of Virginia at Richmond, on Thursday, the 30th of March, 1882—

This day William L. Royall personally appeared before me, in my office, and made oath that he delivered to Samuel C. Greenhow, treasurer of the city of Richmond, on the 29th March, 1882, a true copy of the within order.

Given under my hand.

GEO. K. TAYLOR, *C. C.*"

And on the 30th of March, 1882, the defendant made return to said rule in the words following:

"S. C. Greenhow, treasurer of Richmond, makes return to the within rule that he is ready to receive the coupons of Andrew Antoni, named in said rule, in payment of the said Antoni's taxes, debts, and demands therein named, as soon as the said coupons have

been legally ascertained to be genuine, and the coupons which
6 by law are actually receivable.

S. C. GREENHOW,
*Treasurer, &c.*
By F. S. BLAIR,
*Attorney-General.*

March 30, 1882."

To which return the plaintiff, by counsel, demurred in the following words:

"The plaintiff (petitioner) says that the return of the respondent, Samuel C. Greenhow, is not sufficient in law.

WM. L. ROYALL,
*Attorney for Petitioner, Plaintiff.*"

And at another day, to wit:

VIRGINIA:

In the Supreme Court of Appeals, held at the State Court-house in the city of Richmond on Thursday, the 30th day of March, 1882.

In the matter of the petition of Andrew Antoni for a writ of mandamus to command Sam'l C. Greenhow, treasurer of the city of Richmond and, as such, collector of the taxes of the State of Virginia, to receive from the said petitioner a matured coupon issued by the State of Virginia under the provisions of an act of Assembly of Virginia passed March 30th, 1871, for the sum of three dollars and fifteen cents in lawful money of the United States, in payment of the taxes due by him to said State.

This day came as well the petitioner by his counsel as the said Sam'l C. Greenhow, treasurer and collector of the taxes of the State of Virginia, by the Attorney-General of the State as his counsel, and the said S. C. Greenhow, treasurer, made his return to said rule, to which return the petitioner by counsel demurred, and the said Greenhow joined in said demurrer; and thereupon the hearing of this cause is deferred until the 12th of April next.

A copy—Teste:

GEO. K. TAYLOR, *C. C.*

At which day—to wit, Wednesday, April 12, 1882—this cause was this day partly heard upon the petition of the plaintiff, the rule *nisi*, the return of the defendant to said rule, the demurrer of the plaintiff to said return, and the arguments of counsel, and con-
7 tinued until to-morrow.

And on Thursday, April 13th, 1882—

This cause was further heard upon the petition of the plaintiff, the rule *nisi*, the return to said rule, the demurrer of the plaintiff to said return, and arguments of counsel, and continued until the next day.

And on Friday, April 14th, 1882—

This cause was fully heard upon the petition of the plaintiff, the rule *nisi*, the return to said rule, the demurrer of the plaintiff to said return, and the arguments of counsel; but, because the court here is not yet advised of its judgment to be rendered in the premises, time is taken to consider thereof.

And now at this day, to wit—

At a Supreme Court of Appeals held at the State Court-house in the city of Richmond on Thursday, April 27th, 1882, (be-
8 ing the day and year first herein mentioned,)—

This day came as well the plaintiff by his counsel as the attorney-general on behalf of the defendant, and the court having maturely considered the petition of the plaintiff, the answer of the defendant, the demurrer to said answer and joinder in said demurrer, and being equally divided in opinion, therefore, in pursuance of the act of Assembly in such case made and provided, it is considered that the writ of mandamus prayed for in the plaintiff's petition be denied, and that the defendant recover against the plaintiff his costs by him about his defence in this behalf expended.

And at the instance of the counsel for the plaintiff the court certifies that in the record and at the hearing of this cause there was drawn in question the validity of the act of the General Assembly of Virginia entitled "An act to prevent frauds upon the Com-
9 monwealth and the holders of her securities, in the collection and disbursement of revenues," approved January 14th, 1882, and also an act entitled "An act to amend and re-enact section four, chapter one hundred and fifty-six of the Code of eighteen hundred and seventy-three, in relation to mandamus, prohibition, and so forth," approved April 7th, 1882, on the ground that said acts of the General Assembly of Virginia are repugnant to section ten of article one of the Constitution of the United States, and that the judgment of this court is in favor of the validity of said acts and against the right claimed by the petitioner under said article of the Constitution of the United States.

In making this certificate this court, in the event a writ of error is granted by the Supreme Court of the United States, ven-
10 tures to express the opinion that a speedy hearing of this case in that court is imperatively required by the best interest and welfare of the people of Virginia.

The following are copies of the opinions delivered by the judges in this cause:

Antoni *vs.* Greenhow, Treasurer. } Opinion of Burks, Judge.

When the validity of a statute is judicially drawn in question as being repugnant to the Constitution, State or Federal, it is the rule

of all the courts, and has been from the foundation of the government, never to declare the act void unless its nullity and invalidity are placed in their judgment beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. Cooley on Const. Lim., and cases cited, 182, (side p.)

11 "The opposition between the Constitution and the law must be such that the judge feels a clear and strong conviction of their incompatibility." (Chief Justice Marshall, Fletcher *vs.* Peck, 6 Cranch, 87.)

This court has often laid down the same rule. It is not necessary to cite all the cases; reference to a few will suffice.

"The question whether a law is in accordance with the Constitution (says Judge Brooke) is at all times a very delicate and important question. * * * * It should not be in a doubtful case that the acts of that body [the legislature] should be decided by the courts to be unconstitutional." (Sharpe *v.* Robinson, 5 Gratt., 518, 642.)

In the Homestead cases, 22 Gratt., 266, 280, Judge Christian, in whose opinion the other judges concurred, while stating it to be "one of the highest duties and most solemn obligations [of the court]

12 to declare what the law is," said at the same time that "it is the duty of the judicial department generally to give effect to the acts of its co-equal and co-ordinate department, the legislative, and always in a doubtful case to solve the doubt in favor of the validity of the law."

Speaking for the court in Commonwealth *vs.* Moore & Goodsons, 25 Gratt., 951, 953, he reiterates the rule: "We can declare an act of the General Assembly void *only* when such act clearly and plainly violates the Constitution, and in such manner as to leave no doubt or hesitation in our minds."

After a careful examination of the subject, I am not satisfied that the legislative acts questioned in this proceeding are in conflict with the contract clause of the Constitution; at least my conviction of their invalidity is not so clear and strong as to warrant a judgment

13 to that effect, and I feel bound, therefore, not to solve my doubts against the validity of the acts.

Previous to the act of January 14th, 1882, the holder of a coupon had his remedy by *mandamus*, the proceedings on which were regulated by the provisions to be found in the Code of 1873, ch. 151. This remedy was not wholly abolished by the act in question. It was only modified and the proceedings under the writ somewhat altered. This circumstance, however, is not very material, as the remedy by the writ, according to my construction, is entirely taken away, in cases like the present, by the subsequent act of April 7th, 1882.

Legislation is necessary to enable this court to exercise its original jurisdiction by *mandamus* under the Constitution. (Barrett *vs.* Meredith, 10 Gratt., 650; Page *vs.* Clopton, Judge, 30 Gratt., 415,

14 417.) The remedy provided as a substitute for the writ is

found in sections 1, 2, and 3 of the act of January 14th, 1882. The question is whether it is an adequate substitute for the remedy abolished. If it is not, then, according to a long line of decisions of the Supreme Court of the United States, which need not be cited, it cannot be sustained.

The proceeding by *mandamus* at common law was somewhat anomalous. The return to the alternative writ was taken as true. Its statements could not be directly controverted in that proceeding. If legally sufficient but not admitted to be true, the relator was compelled to resort to his action against the respondent as for a false return. If he succeeded in the action a peremptory *mandamus* was awarded; otherwise not. The proceeding was so changed at an early day by statute (chapter 151, code of 1873) as to dispense with the collateral action on the return. The relator was allowed to
15 traverse the return, and an issue was made up and tried by a jury. If found for the relator, the peremptory writ was awarded. Now, if under that statute the respondent had averred in his return that the coupon tendered was spurious, there would have been an issue duly made up on that question and tried in that proceeding, and the peremptory *mandamus* would have been awarded or not according to the finding. Suppose the legislature, upon the state of facts recited in the act of January 14th, 1882, (the truth or falsity of which recitals and the motives actuating the legislature I do not inquire into, because such inquiry seems to me to be of questionable right in the judiciary department,) had provided in that act that on the return in every case a jury should be empannelled in that proceeding to determine whether the coupon was genuine or no, and that the writ (peremptory) should be awarded or not according to the finding, would such provision have
16 been invalid? It would have amounted to a plea of denial such as every defendant may put into an action against him in any case, and such in fact as the officer might have pleaded, if he chose to do so, in every proceeding by *mandamus* against him prosecuted under the law as it stood before the late act. This act, as I understand it, provides for just such an enquiry as the one suggested. It admits the receivability of coupons, if genuine, in payment of all taxes, debts, and demands due the Commonwealth. The proceeding is to determine whether it be genuine or not, and would seem to be as expeditious and effective as the proceeding by *mandamus*, where the same matter may be put in issue. In both proceedings the coupon is to be received in payment, if ascertained to be genuine. The issue to be framed is whether the
17 coupons tendered are "genuine legal coupons which are legally receivable for taxes, debts, and demands," &c. If by this language it is intended to submit to the jury the question of the legal validity and receivability of a genuine coupon, I should be of opinion that the act could not be sustained. But this does not appear to me to be the fair construction. Such a construction would be wholly inconsistent with the objects and purposes de-

clared in the preamble. I take it that the question to be submitted is, whether the coupons "are genuine," and *therefore* "legal" and "receivable," &c.

One of the most objectionable features of the act would seem to be, that the holder of the coupon is required to pay his taxes or other dues in money or its equivalent, and await the result of his action to have it refunded to him in case he succeeds in the action. But in the case of Tenn. *v.* Sneed, 96 U. S., (6 Otto,)
18 69, upon which the Virginia act was avowedly framed, the same thing was required by the Tennessee act, and the Supreme Court of the United States did not consider that feature as invalidating the act, although the notes tendered were receivable there, as the coupons are here, in payment of taxes and other dues to the State. It would *seem* that the writ of *mandamus* was not a remedy against the State of Tennessee or its officers at the time the act was passed that made the notes or bills in question receivable by the State. Such was not the case here. With us the remedy did lie against the officer when the funding acts of 1871 and 1879 respectively were passed. But I understand the Supreme Court in their opinion to hold that even if *mandamus* had been a remedy, the action given against the officer would have been
19 an adequate substitute. I consider this a case in which, as Judge Lee said in Eyre *v.* Jacob, 14 Gratt., 422, "to doubt is to affirm." I have less hesitation in yielding to this doubt because the decision of the court, in my opinion, furnishes the litigants an opportunity to speedily test the correctness of the conclusions here on the one side or the other in the Supreme Court of the United States, whose decision, whatever it may be, must be a final and conclusive settlement of a much-vexed question. I am of opinion that the peremptory *mandamus* should be refused."

"Antoni
*vs.*
Greenhow, Treasurer. } Opinion of Anderson, Judge.

I am of opinion that the act of Assembly approved January 14th, 1882, which is relied on to justify the refusal of Greenhow (treasurer) to receive the coupon tendered by the petitioner for his taxes
20 due the State, is plainly in violation of the Constitution of the State and of the United States. Whilst its professed object in its title is "to prevent frauds upon the Commonwealth and the holders of her securities," it in effect destroys or greatly depreciates the value of those securities, and thereby impairs the obligation of contracts under the vain pretext that it is necessary to protect the commonwealth against frauds. It not only destroys or renders almost valueless the coupons, but also the coupon bonds, amounting to millions of dollars, issued by the State by authority of the act of March 30th, 1871, and whose value depends upon the prompt payment of interest, of which assurance was given by the State to the holders

of those bonds by the stipulation in the contract that the coupons,
at and after maturity, should be receivable for all taxes,
21 debts, &c., due the State. This statute prohibits the revenue
officers to receive any coupon, though unquestionably genuine, when tendered for or in discharge of taxes, &c., due the State, and requires the bearer of the coupon so tendered to pay his taxes in coin, or other currency, which, I think, is plainly a repudiation or annulment of the State's contract. I am of opinion that the act provides no remedy for the enforcement of the contract of the State to receive coupons in payment of taxes, but that it repudiates and annuls the same by requiring the bearer and tenderer of the coupon to pay his taxes in coin, &c., and it provides a very inadequate remedy for the tax-payer to recover his money back which has been wrongfully extorted from him.

It authorizes him to bring suit against the State to recover back the money which he has been wrongfully compelled to pay, and to make up an issue to be tried by a jury, without any averment on the part of the State that the coupon he tendered is spurious, whether said coupon is genuine, and not only so, but whether it is legal, and
not only so, but whether it is *legally receivable for taxes;* and
22 requires the commonwealth's attorney or the Attorney-General to appear and defend the suit; and allows either party the right of appeal to the Circuit Court and the Court of Appeals. This would be a poor remedy for the tax-payer who had a right, by the pledged faith of the State, to pay his taxes in the coupon which he held to recover back the money which he had been wrongfully compelled by the State to pay, which would be usually small, to involve himself in a suit against the State, with the courts, the attorneys of the commonwealth, and the Attorney-General all against him. When such a suit would end, and how it would end, especially if the legal question whether his coupon was "legally receivable for
taxes, debts, and demands" was to be left to a jury, would be
23 involved in great uncertainty. To get back his pittance of money wrongfully extorted from him, he would have to subject himself to harassing, protracted, and expensive legislation, with all the chances of success against him, for the reasons stated, and incur costs perhaps tenfold the amount he sought to recover. Can such a remedy be regarded as an adequate remedy, in the place of his remedy by *mandamus*, which the law guaranteed to him at the time the contract was made, and which had been the law of Virginia from a very early period, and which also proved the means whereby the State could test the genuineness of the coupon, if she denied its genuineness, through her officer, in his return to the rule.

The State might do that now; and there was no necessity
24 for such a device and contrivance to destroy the value of the coupon and depreciate the value of the bond of the State as would be effectuated by this act, if it is enforced, to protect the State against frauds.

It is very true the court should not declare a law to be unconsti-

tutional if it has grave doubts on the subject. But whilst, in a doubtful case, the court should give to the Legislature that enacted the law the benefit of its doubts, I hold that, where the law is a plain violation of the Constitution, there rests upon the court the highest obligation so to declare. I am of opinion that there is an important distinction between this case and the case of Tennessee *vs.* Sneed, so much relied on by the Attorney-General.

25 It is not my purpose to argue the questions involved in the case, but merely to express my opinion upon them. But I will state one of the grounds of my opinion that this distinction exists. In the Tennessee case, the refusal of the State to receive the bank bills in payment of taxes affected only a contract on part of the State that they should be so receivable, and the remedy had to be provided for the breach of the contract in that respect. But in this case there was an obligation on part of the State, by the contract, which reaches far beyond the obligation to pay the interest-coupons in the hands of the bearer—the obligation of the coupon bonds, to which the coupons were attached; the value of those bonds depending upon their being readily convertible into

26 money in the markets, and that depended upon the prompt and punctual payment of the interest semi-annually; and the receivability of the coupons for taxes, for which the State was pledged by the contract, gave assurance that the interest would be punctually paid, and was material to the value of the bond.

The act in question only professes to provide a remedy for the refusal of the State to receive the coupon for taxes, &c., and for the repayment of the money wrongfully coerced from the tax-payer. If the provision made for that is an adequate remedy, (which I think it clearly is not,) what remedy is provided for the depreciation of the value of the bonds and the impairment thereby of the obligation of the contract of the State vouched by her bonds to which the coupons are attached? There is none; absolutely none.

I refer to the more recent decisions of Hartman *vs.* Green-

27 how and State of Louisiana *vs.* Pillsbury, Mayor, the latter decided a few days ago, as decisive of this case. Indeed I might refer to the unbroken current of decisions of that court prior to the cases alluded to.

In all controversies that have been before this court touching the indebtedness of the State, it has been my endeavor to maintain faithfully the obligation of contract and the supremacy of the Constitution, both State and Federal, upon which foundations society rests, and which are essential to the existence of government, State and Federal, and to the welfare and prosperity of the citizen.

In the case before us I have been unable conscientiously to come to any other conclusions than those I have expressed. It may

28 prove, however, to be a fortunate disposition of this case by a divided court, because two of my brethren have not been able to reach the same conclusions with that freedom from doubt which would warrant them in declaring the law to be unconstitu-

tional; so that the whole subject may be transferred from this court to the Supreme Court of the United States, whose province it is to enforce the obligations of contract and maintain the supremacy of the Constitution, and whose decision is final. For this result to the case here I have no regret, but am rather gratified, as it is of the last importance to the State that these questions should be speedily and finally settled, and as all will bow to the decision of that
29 high tribunal of last resort; and if I am in error, I shall be glad to be corrected."

"Antoni
*vs.*
Greenhow, Treasurer. } Opinion of Staples, Judge.

The views which I entertain with respect to the coupon features of the funding bill are known to all those who have paid any attention to the decisions of this court on that subject. They are fully set forth in Antoni *vs.* Wright, 22 Grattan, 859, and Clarke *vs.* Tyler Sergeant, 30 Grattan, 145. My opinion, as expressed in these cases, is that the Legislature have the power to repeal the law declaring that coupons shall be received in payment of taxes and other public dues, and that such repeal did not impair the obligation of any contract within the true intent and meaning of the Constitution of the United States.

Entertaining this opinion, I must of course hold that it is
30 competent for the Legislature to prescribe terms and conditions with which the holder of the coupon must comply in order to use it in discharge of his dues to the State. For if the Legislature may declare that the coupon shall not be received at all in payment of taxes, it may declare it shall not be received until it is proved to be genuine by some proper proceeding before the courts. These views necessarily lead me to the conclusion that the act now under consideration is valid and constitutional.

If, however, the question is to be regarded as settled otherwise by the decisions of this court and the Supreme Court of the United States, I am still of opinion that this court ought to sustain the act in question for the reasons set forth in the opinion of Judge Burks. Others might perhaps be given in addition to those suggested by him, but it is not necessary or proper to enter into their consideration here. This court being equally divided, it has been
31 agreed, in conformity with our uniform practice and course of proceeding, that the result should be announced without any detailed or protracted discussion of the points involved in this important controversy.

The case can now go to the Supreme Court of the United States, if the parties interested are inclined to take it there. For one, I rejoice that it is so, and that at last we have a well-grounded hope that this most perplexing and embarrassing question will no longer be a cause of strife and contention among the people of Virginia."

Judge CHRISTIAN'S views:

After the foregoing opinions were read, Judge Christian, the acting president of the court, made in substance (orally) the following statement of his views:

When the court is equally divided in opinion, (as in this case,) it would be an unnecessary and useless task to enter into any elaborate discussion of the important questions involved in the case
32 before us, or to state at length the reasons and the authorities which govern each judge in the conclusions at which he has arrived. Such discussion would be useless, because it would not change or affect the decisions of the case. I am content, therefore, to say for myself (and this is sufficient for me to say) that after a most careful consideration of all the questions so elaborately argued at the bar, I am of opinion that the acts of the General Assembly in question are plainly unconstitutional, and that they are manifestly in violation of that provision of the Federal Constitution (interpreted by one unbroken current of decisions of the Supreme Court of the United States) which declares that no State shall pass any "law impairing the obligation of contracts."

Now, while I admit it is the duty of the judicial department of the government generally to give effect to the acts of its co-
33 equal and co-ordinate department, the Legislature, and always in a doubtful case to solve the doubt in favor of the validity of the law, on the other hand it is one of its highest duties and most solemn prerogatives *to declare what the law is*, and where the legislative will is in contravention of the *supreme law of the land* the judicial department must uphold *that* law, and unflinchingly guard it as *invincible*.

For myself, I must say I have no doubt that the acts of the General Assembly in question are plainly unconstitutional. I am for declaring them null and void, and for directing the issuance of a peremptory *mandamus* compelling the treasurer of the city of Richmond to receive the coupons tendered by the petitioner.

I have nothing more to say, except that I entirely concur in what has already been so well and aptly said by my brother An-
34 derson.

The result of a divided court is that the petition for a writ of *mandamus* is denied.

I cordially unite with my brethren in the hope expressed by them that this case may now go up to the Supreme Court of the United States, and that by the decision of that supreme tribunal of last resort of this great country, (whether it be in favor or against the views I entertain,) the perplexing questions which have vexed so much and so long this old Commonwealth, retarding its growth, its prosperity, and its welfare, may be laid at rest forever."

A true transcript of the record. Teste:

GEO. K. TAYLOR, *C. C.*

Fee for transcript, $6.40.

35 STATE OF VIRGINIA, *City of Richmond*, } to wit:

I, George K. Taylor, clerk of the Supreme Court of Appeals of Virginia at Richmond, do hereby certify that the foregoing is a true transcript of the record and proceedings upon a petition for a mandamus lately depending in the said Supreme Court of Appeals of Virginia, wherein Andrew Antoni was plaintiff and Samuel C. Greenhow, treasurer of the city of Richmond and, as such, collector of the taxes due to the State of Virginia in said city, was defendant, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof, I hereto set my hand and annex the seal of said court this 13th day of May, 1882.

[SEAL.] GEO. K. TAYLOR, *C. C.*

36 To the Chief Justice of the Supreme Court of the United States:

Your petitioner, Andrew Antoni, would respectfully represent that he is aggrieved by a judgment pronounced by the Supreme Court of Appeals of the State of Virginia, which is the highest court of the State of Virginia in which a decision in the suit could be had, in a suit wherein your petitioner was plaintiff and Samuel C. Greenhow was defendant, on the 27th day of April, 1882. The said Samuel C. Greenhow is the treasurer of the city of Richmond.

A certified copy of the record in said suit is presented herewith. An inspection thereof will show that your petitioner prayed the said court to award him a writ of mandamus directed to the defendant, the treasurer of the city of Richmond, commanding him to receive a certain coupon of the State of Virginia, therein described, cut from a bond of the State of Virginia issued under the provisions of an act of Assembly approved March 30th, 1871, in payment of taxes due to the State of Virginia by your petitioner, and that the said court refused to award and grant to your petitioner the said writ.

Your petitioner would respectfully show that when the State of Virginia issued her said coupons under the provisions of the act
37 aforesaid, she thereby contracted that she would receive the coupons from the holder of them in payment of any taxes, debts, demands, and dues due to herself. But the said treasurer of the city of Richmond, who is charged with the duty of collecting taxes due to the State of Virginia in said city, refused and refuses to receive *to receive* the said coupon in payment of your petitioner's taxes, justifying his refusal by relying upon an act of the Legislature, approved January 14th, 1882, which forbids him to receive said coupons for taxes except upon conditions which your petitioner avers are not justified or authorized by the aforesaid contract of the State, and the said court sustained the validity of that act.

Your petitioner would respectfully show that the said act of the Virginia Legislature is a law impairing the obligation of his contract,

and is therefore contrary to the Constitution of the United States, and is null, void, and of no effect, and that the said judgment of the Supreme Court of Appeals of Virginia giving efficacy and force to said act of Assembly deprives him of his rights under the Constitution of the United States, and he is therefore aggrieved thereby. He therefore prays that a writ of error may be awarded to him, directed to the said Supreme Court of Appeals of the State of Vir-
38 ginia, commanding it to remove the record of said suit and judgment and proceedings into the Supreme Court of the United States, to be there reviewed, reversed, and determined upon as to that honorable court shall see fit.

WM. L. ROYAL,
*for Petitioner.*

(Endorsed:) Antoni *v.* Greenhow; petition for writ of error.

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of Appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Andrew Antoni, petitioner, and Samuel C. Greenhow, treasurer of the city of Richmond, respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of or commission held
40 under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said petitioner as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the tenth day of May, in the year [SEAL.] of our Lord one thousand eight hundred and eighty-two.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by—
M. R. WAITE,
*Chief Justice U. S.*

41 (Endorsed:) Virginia: In the clerk's office of the Supreme Court of Appeals of Virginia, at Richmond, May 13th, 1882. I, George K. Taylor, clerk of the Supreme Court of Appeals of Virginia at Richmond, do hereby certify that a copy of the within writ is on file in my office. Given under my hand this 13th May, 1882. George K. Taylor, clerk of the Supreme Court of Appeals of Virginia at Richmond.

42 THE UNITED STATES OF AMERICA

To Samuel C. Greenhow, treasurer of the city of Richmond, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Appeals of the State of Virginia, wherein Andrew Antoni is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, this tenth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

M. R. WAITE,
*Chief Justice U. S.*

43 On this 11th day of May, in the year of our Lord one thousand eight hundred and eighty-two, personally appeared William L. Royall before me, the subscriber, M. F. Pleasants, clerk of the Circuit Court of the United States for the Eastern District of Virginia, and United States Commissioner, and makes oath that he delivered a true copy of the within citation to Samuel C. Greenhow, treasurer of the city of Richmond, Virginia, after showing to him

the signature of Chief Justice M. R. Waite to the within citation, on the 11th day of May, 1882.

Sworn to and subscribed the 11th day of May, 1882, A. D. 1882.

M. F. PLEASANTS,
*Clerk U. S. Circ't Court Ea. Dist. Va., & U. S. Com'r.*

(Endorsed:) Virginia: In the clerk's office of the Supreme Court of Appeals of Virginia, at Richmond, May 13th, 1882. I George K. Taylor, clerk of the Supreme Court of Appeals of Virginia at Richmond, do hereby certify that a copy of the within citation is on file in my office. Given under my hand this 13th May, 1882. George K. Taylor, clerk Supreme Court of Appeals of Virginia at Richmond.

44 Know all men by these presents, That we, Richard W. Maury and J. W. Maury, Jr., are held and firmly bound unto Samuel C. Greenhow, treasurer of the city of Richmond, in the full and just sum of five hundred dollars, to be paid to the said Samuel C. Greenhow, treasurer, &c., certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents.

Sealed with our seals and dated this ninth day of May, in the year of our Lord one thousand eight hundred and eighty-two.

Whereas lately, at a Supreme Court of Appeals of the State of Virginia, in a suit depending in said court between Andrew Antoni, petitioner, and Samuel C. Greenhow, treasurer, &c., respondent, a judgment was rendered against the said petitioner, and the said petitioner having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel C. Greenhow, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Andrew Antoni shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force
45 and virtue.

RICH'D W. MAURY. [SEAL.]
J. W. MAURY, JR. [SEAL.]
[SEAL.]

Sealed and delivered in presence of—
WM. L. ROYALL.

Approved by—

M. R. WAITE,
*Chief Justice U. S.*

MAY 11th, 1882.

UNITED STATES OF AMERICA,
*Eastern District of Virginia,* } *ss:*

I, M. F. Pleasants, clerk of the Circuit Court of the United States for the Eastern District of Virginia, do hereby certify that Richard W. Maury and J. W. Maury, Jr., whose names are signed to the within obligation bearing date the 9th day of May, 1882, personally appeared before me in the city of Richmond, Virginia, and made oath, each for himself, that he is worth the sum of five hundred dollars over and above all just debts and obligations.

Given under my hand and under the seal of my said court this 9th day of May, 1882.

[SEAL.] M. F. PLEASANTS,
*Clerk.*

46 VIRGINIA:

In the clerk's office of the Supreme Court of Appeals of Virginia, at Richmond, May 13, 1882.

I, George K. Taylor, clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that the foregoing is a true copy of a bond the original of which is on file in my office.

Given under my hand this 13th May, 1882.

GEO. K. TAYLOR,
*Clerk Supreme Court of Appeals of Virginia, at Richmond.*

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OFFICE SUPREME COURT
JAMES McKENNEY, CLERK

10769

# Supreme Court of the United States.

ANDREW ANTONI,
*vs.*
S. C. GREENHOW.

No. 845.

*Advanced and ordered to be Argued*
*January 8th, 1883.*

**Brief of Plaintiff in Error.**

# ADDENDUM.

I add a few remarks on the act of April 7th :

When this contract was made the Constitution of the State conferred upon the Supreme Court of Appeals jurisdiction of the writ of mandamus (Va. Const., Article VI., sec. 2). The act of Assembly, approved June 23, 1870, (Acts 1869–70, ch. 171, sec. 4, p. 219) provided that the said Court should have power to issue writs of mandamus in all cases warranted by law. In *Antoni* v. *Wright*, 22 Gatt., 859, the Supreme Court of Appeals held that it was the coupon-holder's right to come to it for a mandamus. The right, therefore, to go into the Supreme Court in the first instance was as clearly a part of the contract as the right to have the coupon taken for taxes, and it is as clearly an impairment of the obligation of the contract to forbid the coupon-holder to go into that Court in the first instance, as it is to forbid him to pay his taxes with it.

Now, if the State were keeping faith with her creditors and paying her interest, although forbidding them to go into the Supreme Court would impair their contracts, yet I do not claim that it would be an impairment which a Court would heed. It would work no substantial injury. It would constitute a striking instance of an injury which came within the principle *de minimis*. But this is not the case. She pays no interest, and the 15th section of the act of February 14, 1882, forbids payment of interest on any bonds except those to be issued under its provisions. The State, therefore, intends to escape her liability to pay interest, whether in a direct form or in the indirect form of receiving the coupons for taxes, and the act of April 7th is part of a general scheme of legislation to accomplish her aim. Viewed from this standpoint, the act of April 7th does the coupon holder a mortal injury. If, after the State has enacted legislation hostile to him, he may at once attack that legislation in the highest Court of the State, he can have an early and immediate decision that the harmful legislation is void, and thus he is kept but a short time out of his rights. If this highest Court trifles with him and will not pass upon his claims, he can apply directly to this Court for protection. But if he must go in the first instance to the inferior Courts of the State, they may pocket his application and refuse for an unreasonable time to act on it. The highest Court being in sympathy with the inferior ones (if that were the case), would refuse to aid him in compelling the inferior ones to act on his application ; and this highest Court being

between this Court and the inferior ones, this Court could not act upon these inferior ones directly. After he got the inferior Court to act on his application (if he ever did), he cannot appeal as of right, under the laws of Virginia, to the highest Court, but he must present a petition praying that an appeal he allowed. The highest Court may pocket this petition and refuse to act on it for an unreasonable time, and if it allows an appeal it may then put it at the foot of its docket, which is three years behind, and refuse to hear the appeal for that time. It would be easy to expand the possible injuries that the State may do the coupon-holder into a general plan that would destroy him, if she may deprive him of his right to commence proceedings in her highest Court, where this Court can control the proceedings directly, and drive him into her inferior Courts. Being determined to destroy these coupons if she can, she may remodel her judiciary and create a half-dozen successive tribunals, each higher than the other, and she may compel him to commence his proceedings in the lowest, going by successive stages to the highest, and being delayed a year or more in each. This would render the coupon-holder's rights of no sort of value to him. I repeat, that his right to commence his proceedings in her highest Court is one of his most valuable rights, and that all the others depend upon this. This act was passed whilst the Court had this case under consideration, just a few days before judgment in it was rendered. It was passed, therefore, to defeat this case. The cases of Louisiana *v.* Pillsbury, Mayor of New Orleans, October Term, 1881, and Butz *v.* Muscatime, 8 Wallace, 575, are decisive against the act.

# Supreme Court

OF THE UNITED STATES.

ANDREW ANTONI
*vs.*
S. C. GREENHOW.

*No.* 845.

## BRIEF OF PLAINTIFF IN ERROR.

### Statement of the Case.

As far back as the year 1820 the State of Virginia adopted the policy of creating works of internal improvement, such as canals, railroads, turnpikes, &c., by borrowing money upon her own credit with which to construct them. She continued this policy down to the beginning of the late civil war, and nearly every railroad, canal and turnpike in the State to-day is in great part constructed with the money so borrowed. She issued her bonds for what she borrowed, promising to pay, until the principal was returned, six per cent. per annum as interest.

She kept her promise faithfully until the war came on, but after that, her bonds being held principally in Europe and in the Northern States, she paid no more interest until 1871. The end of the war found her territory and population divided into two States. During the war one-third of her territory and population had been erected into the State of West Virginia. In the year 1871 the principal of her debt, together with its unpaid and overdue interest, amounted to the sum of

about $45,000,000. In 1871 the Legislature of the State concluded that it was about time something should be done with a view to providing for the debt. As that part of the territory and population embraced within the limits of West Virginia had participated in borrowing the money and in sharing its benefits, it was thought but fair that West Virginia should pay her equitable portion, which, according to population and territory, was assumed to be one-third. This was adopted as the true basis for an adjustment. It was determined to offer to the holders of Virginia's bonds, that if they would surrender to the State her old bonds, the State would issue to them new bonds for two-thirds of the principal and overdue interest to bear six per cent. interest, and a certificate that West Virginia owed them the other third. It was obvious that it would be necessary to offer some inducement to the creditor before he would accept this offer. He would naturally say in reply to this offer: "I have your bond now for one thousand dollars, upon which you pay no interest. You ask me to surrender it and take your bond for $666 2-3. What assurance have I that you will pay interest upon your new bond? It seems to me that the transaction will amount to my releasing you from $333 1-3 without anything whatever in return." To meet this obvious objection of the creditor, the offer went further and provided that the interest should be payable semi-annually, on the 1st January and 1st July of each year, and that the interest promises for thirty-four years should be embodied in coupons attached to the bonds. In case any of these coupons were not redeemed in money by the State when they became due, then the State agreed that she would receive them from any taxpayer or debtor to the State in payment of such tax or debt. An act was accordingly passed and approved March 30th, 1871, embodying this offer. It can be seen in the Acts of 1871, Chapter 282, page 378, and is printed as a note to this page.*

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* CHAP. 282.—*An Act to provide for the Funding and Payment of the Public Debt. Approved March 30th*, 1871.

WHEREAS, In the formation of the State of West Virginia, there were included within its boundaries about one-third of the territory and population of the State of Virginia; and whereas, in the ordinance authorizing the organization of said State, it was provided that the said State shall take upon itself a just proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, eighteen hundred and sixty-one, which provision has not yet been fulfilled, although repeated and earnest efforts in that behalf have been made by this State,

The creditor saw at once that this part of the offer would make his bonds of great value to him. Upon the bonds that he then held, he had no means of enforcing payment of his interest. He depended for it upon the good faith of the State alone, and if she neglected or refused to pay him, he was without redress. But the new bonds would stand upon a different footing. If she neglected or refused to pay interest upon them, he could sell his coupons to the taxpayers of Virginia, who could pay their taxes with them, and if her tax-collectors

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and will continue to be made as long as may be necessary; and whereas, the people of this Commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas, it has been suggested that the authorities of West Virginia may prefer to pay that State's portion of said debt with the holders thereof and not to this State, as the constitution of this State provides: Now, therefore, to enable the State of West Virginia to settle her proportion of said debt with the holders thereof, and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt as the same shall become due; therefore,

1. Be it enacted by the General Assembly of Virginia, that from and after the passage of this act, no bond, certificate, or other evidence of indebtedness, shall be issued for any portion of the debt of this State; nor shall any interest be paid upon any part or portion of said debt, except as hereinafter provided.

2. The owners of any of the bonds, stocks, or interest certificates heretofore issued by this State, which are recognized by its constitution and laws as legal, except the five per centum dollar bonds, and what are known as sterling bonds, but including the stock of the old James river company, and the bonds of the James river and Kanawha company guaranteed by this State, may fund two-thirds of the amount of the same together with two-thirds of the interest due or to become due thereon, to the first day of July, eighteen hundred seventy-one in six per centum coupon or registered bonds of this State of the denominations of one hundred and multiples thereof, dated that day, and to become due and payable in thirty-four years after date, but redeemable at the pleasure of the State, after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer, and the coupons to bearer, at the treasury of the State, and bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or vice versa, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues, and demands due the State, which shall be so expressed on their face; and the bonds shall bear on their face a declaration to the effect that the redemption thereof is secured by a sinking fund provided for by the law under which they are issued. The holders of the five per centum dollar bonds may, in a like manner, fund the same in like bonds, bearing, however, five instead of six per centum interest. In the funding herein authorized for any fractional sums less than one hundred dollars, certificates shall be issued bearing the same date and rate of interest, and payable at the same time as

refused to receive them from the taxpayers, there was the writ of mandamus, an existing remedy provided by the laws of the State by which the tax-collectors could be compelled to receive them. Thus, though the bondholder were in England or Russia, or China or Japan, he could feel certain of his interest upon the new bond. He, therefore, concluded that it was to his interest to accept the offer. The process of funding under the act commenced at once, and proceeded very

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the bonds issued under this section; which certificates, in sums of one hundred dollars, or any multiple thereof, shall be exchangeable for bonds of the character herein authorized to be issued; and new certificates of like character may be issued for any fractional sums less than one hundred dollars, which may remain in making such exchange.

3. Upon the surrender of the old and the acceptance of the new bonds for two-thirds of the amount due as provided in the last preceding section, there shall be issued to the owner or owners, for the other one-third of the amount due upon the old bond, stock, or certificate of indebtedness so surrendered, a certificate bearing the same date as the new bond, setting forth the amount of the bond which is not funded as provided in the last preceding section, and that payment of said amount, with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State of Virginia existing at the time of its dismemberment, and that the State of Virginia holds said bonds, so far as unfunded, in trust for the holder or his assignees; and provided further, that until such final settlement with West Virginia, there shall be paid upon what are known as sterling bonds in the manner now prescribed by law, two-thirds of the interest, accruing on the principal of said bonds, after July 1st, eighteen hundred and seventy-one; and for the interest accrued to said date certificates dated on that day shall be issued, drawing the same rate of interest as the bonds, two-thirds of which shall be paid as provided to be paid one the bonds. The remaining one-third of unpaid interest, both on the bonds and certificates, shall be payable in money, and the principal of said certificates in new sterling bonds of the same character as the old, in accordance with such final settlement as shall be made with West Virginia.

4. The treasurer is hereby authorized and directed to forthwith cause to be prepared engraved or lithograph registered bonds and bonds with coupons and certificates of the character mentioned in the second and third sections of this act, and when prepared shall commence the issuance of the same, as herein provided. The bonds and certificates shall be signed by the treasurer and countersigned by the second auditor; the coupons shall be signed by the treasurer, or a facsimile of his signature shall be stamped or engraved thereon. Each denomination of bonds herein authorized to be issued, both registered and coupon, shall constitute a series, and the bonds of each series shall be numbered from one upwards, as they are issued; and the coupons, in addition to the number of the bond to which they are attached, shall be numbered from one to sixty-seven. Each class of certificates authorized to be issued by this act shall be numbered respectively from one upwards, and in addition thereto each certificate shall contain the number and date of the bond or certificate on account of which it is issued. Each bond, certificate of stock, and interest certificate, to be funded as herein provided, shall first be delivered to the second auditor, who shall calculate and determine the amount for

rapidly. In March, 1872, $30,000,000 of the old bonds had been surrendered, and new bonds of the State bearing the tax-receivable coupons for $20,000,000 had been issued, together with the State's certificates that West Virginia owed $10,-000,000. (See Report of Second Auditor for 1877, p. 3.) The exact amount funded under the act of March 30th, 1871, with the amount bearing tax-receivable coupons may also been seen in the Acts of Assembly for 1878–79, p. 407, state-

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which a bond shall be issued, and the amount for which certificates shall be issued, under the second and third sections of this act; which calculation shall be endorsed dated and signed by him on the back of such bond, certificate of stock or interest certificate, and he shall cause a proper registry thereof, together with the date and number of the bond, certificate of stock, or interest certificate, to be made and kept in his office. After such endorsement and registration, the second auditor shall deliver the bond, certificate of stock or interest certificate, to the treasurer, who shall thereupon deliver to him a bond or bonds and certificates of the character named in the second and third sections of this act, duly signed and numbered, for the several amounts, respectively, according to said endorsement. The second auditor, after making a proper registry of said bond or bonds, and certificates to be kept in his office, shall deliver the same to the person entitled to them. The treasurer shall, by proper endorsement, written or stamped, upon each bond, certificate of stock, or interest certificate so surrendered and delivered to him, cancel the same, and endorse thereon the date of such cancellation, and shall preserve the same in his office until otherwise directed by law. The treasurer shall also have made and preserved in his office a proper registry of every bond and certificate delivered by him to the second auditor, and whenever a coupon bond shall be issued payable to the order of any person or firm, he shall secure and preserve the signature of such person or firm as a party of such registry whenever practicable.

5. Whatever sum may be realized from the claims of this State against Selden Withers and Company, and the Chesapeake and Ohio Canal Company, and from the sale or disposition of the stocks and bonds, and debts owned by the State in and against any and all railway and other improvement companies, and all sums which may be realized from the claims of this State against the United States, and from any sales of any real estate now belonging to the Commonwealth, shall be paid into the treasury of the State to the credit of the sinking fund hereby authorized and created. In the year eighteen hundred and eighty, and annually thereafter, until all the bonds issued under and by authority of this act shall have been paid, there shall be levied and collected, the same as other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real, and mixed, in the State, which shall be paid into the treasury of the State to the credit of the sinking fund. The treasurer, the auditor of public accounts and second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums may be to the credit of the sinking fund, to the purchase and redemption of bonds issued by authority of this act.

6. All necessary expenses incurred in the execution of this act shall be paid out of any moneys in the treasury not otherwise appropriated,, on the certificate of the correctness of the same, signed by the treasurer and second auditor, and approved by the Governor.

7. This act shall be in force from and after its passage.

ment headed "Account of State Indebtedness." On the 7th March, 1872, the Legislature of Virginia passed the following act:

"*Be it enacted by the General Assembly of Virginia* that hereafter it shall not be lawful for the officers charged with the collection of taxes or other demands of the State, due now or that hereafter become due, to receive in payment thereof anything else than gold or silver coin, United States Treasury notes, or notes of the national banks of the United States. All acts or parts of acts inconsistent with this act are hereby repealed." Acts of 1871, '72, ch. 148, p. 141.

In the case of *Wise Bros.* v. *Rogers*, 24 Gratt., 169, the Court of Appeals of Virginia held that this act forbade the issue of any bonds after its passage, with tax-receivable coupons attached, though it permitted the funding process to go on in all other respects as though it had not been passed. There being $20,000,000 of bonds with tax-receivable coupons in existence when this act passed, and the Court having made the decision just referred to, it follows that $20,000,000 are all the bonds that can be issued under this act that can have these coupons.*

The holders of the bonds with tax-receivable coupons at once attacked this act as one impairing the obligations of a contract, and the Supreme Court of Appeals of Virginia held, in the case of *Antoni* v. *Wright* (22 Gratt., 833), that it was unconstitutional and void. The ruling in this case was approved of and affirmed in the case of *Wise Bros.* v *Rogers*,

* The exact figures for the bonds which have tax-receivable coupons may be seen in the Act of February 14th, 1882, Acts 1881–82, p. 88, chapter 84, at page 94 of the same, which is appendix D of this brief. The bonds referred to there as "Consols" are the bonds issued under the Act of March 30th, 1871, which have tax-receivable coupons, of which the act states there are $14,369,974.81. These bear six per cent. interest per annum. The other bonds which have tax-receivable coupons are those described in the act as "Ten forties," which are the bonds issued under the Act of March 28th, 1879 (Acts 1878–79, p. 264, chap. 24). Of these the act aforesaid states there are $8,517,600. These bonds bear three per cent. interest for ten years, four per cent. interest for twenty years, and five per cent. interest for ten years, and have coupons receivable for taxes for all their accruing interest. The obligation of the State to receive the coupons from these bonds for taxes was declared by her Supreme Court of Appeals in the case of Williamson *v.* Massey, Auditor, 33 Grattan R., 237.

These are all the bonds of the State which have tax-receivable coupons, and the amount that comes due annually from these is $1,117,650.

24 Gratt., 169, and again, after the most elaborate discussions throughout the State, in the Legisture and press, and at the bar of the Court of Appeals in the case of *Clarke* v. *Tyler*, 30 Gratt., 134.

A full and authentic history of this whole matter can be seen in Senate Document No. 24, Session of 1877–'78. Senate Journal for that year filed with the clerk, a part of which is printed as Appendix A of this brief.

After the decision of *Antoni* v. *Wright*, discussion of this subject ended for a time, and the new bonds grew very greatly in favor. Their market value enhanced very greatly, and transactions in them by purchase and sale amounted to many millions of dollars. Had no agitator, to accomplish his own personal ends, stirred up new strife, the State's debt would have been paid according to the provisions of the act of 1871, justice would have been done, and the theretofore untarnished name of the State would have been preserved to her. But in 1876 one William Mahone, being without a job (the railroad company of which he had been president having become bankrupt and having been taken from him by a court of justice and put into the hands of a Receiver), came before the people of Virginia with a proposition to "Readjust" the debt. This proposition was that the State should force the holders of her bonds with tax-receivable coupons to surrender those bonds and take new bonds for a less amount of principal and bearing a smaller rate of interest, although her highest Court had solemnly adjudged that the Constitution of the United States forbade her to interfere in any way whatever with the obligation of her contract.

Mr. Mahone offered himself as a candidate for the nomination of the Democratic party for Governor upon this proposition, but that party refused to nominate him, and in his stead nominated a gentleman in favor of a preservation of the State's honor and contracts. This gentleman was elected Governor in the Fall of 1877, but at the same time a Legislature was elected, in both bodies of which there was a majority for Mahone's scheme of Repudiation, euphemistically called by him and them "Readjustment."

Both bodies of this Legislature at once concurred in passing an act forbidding collectors, again, to receive coupons in payment of taxes, and providing for a substantial repudiation of the entire debt. A certified copy of this act is filed with

the clerk, and it is printed as Appendix B of this brief. For convenience it will be referred to as the "Barbour Bill," by which name it is popularly known. The bill was vetoed by the Governor, and as there was no sufficient vote to pass it over his veto, it failed to become a statute.

After the failure of this bill, a compromise between parties was effected, and the same Legislature enacted a statute which offered to refund the entire debt into bonds bearing three per cent. interest for ten years, four per cent. interest for twenty years, and five per cent. interest for ten years, with coupons for the interest receivable for taxes, and this act was approved by the Governor. (See it Acts 1878–'79, Ch. 24, p. 264.) Very rapid funding commenced under this act, and it is probable that if matters had been left alone, peace and quiet would have been restored in the State under its provisions, and that the entire debt would have been funded under it. But then Mr. Mahone's occupation would have been gone, and his hopes for the future would have rested upon the cold charities of the world, which, he had every reason to suppose, would be doled out to himself most sparingly. He therefore immediately took measures for organizing a party to overthrow this act and all that might be done under it, and in the following Fall, after a contest in every neighborhood in the State which shook to its foundation every pillar of the social fabric, and amounted almost to civil war, his party elected a majority in both houses of the General Assembly. The Legislature at once passed an act forbidding collectors of taxes to receive coupons, and providing machinery for repudiating one-third of the principle of the public debt, and one-half of the interest on the remainder. The machinery consists of several ingeniously devised tricks and devices nominally intended to preserve to the creditors all their rights, while protecting the State against possible injuries, but really intended to destroy the coupon as a tax-paying instrument, and thus to secure a repudiation of all the debt not provided for in that bill. The act which is attacked in this suit is nothing more, in effect, than a repro duction of the tricks of that act. For convenience this act will be referred to as the "Riddleberger Bill." It was likewise vetoed by the Governor, and as there was not the requisite vote to pass it over his veto, it failed to become a statute.

A certified copy of it as it passed both houses is filed with the clerk, and it is printed as Appendix C of this brief.

Shortly after this, this Court held, in the case of *Hartman* v. *Greenhow*, 102 U. S. R., 672, that these coupons constituted a contract between the State and the holder, the obligation of which the State could in nowise impair, and immediately after that decision came what follows. In the Fall of 1881 a new Governor and a new Legislature were to be elected, and Mahone's party (I speak of it as Mahone's party for the reason that he was the proprietor of it as completely as a man can own his coat) adopted the "Riddleberger Bill" as its party platform. Its nominating conventions proclaimed it as the platform upon which each candidate for office would stand, and each and every candidate proclaimed in his quarter of the State, that, if elected, he would force a "Readjustment" of the State debt, upon the principles of the "Riddleberger Bill," and that he would do that through the devices for destroying coupons which that bill contained. This is a matter of as current history in the State as it is that the Confederate Army surrendered at Appomattox.* Mahone's party elected

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* The following is the second plank in the platform adopted by the Readjuster State Convention, held at Richmond on the 2d of June, 1881:

"*Second.*—We reassert our purpose to settle and adjust our State obligations on the principles of the 'bill to re-establish public credit,' known as the 'Riddleberger bill,' passed by the last General Assembly and vetoed by the Governor. We maintain that this measure recognizes the just debt of Virginia in this, that it assumes two-thirds of all the money Virginia borrowed, and sets aside the other third to West Virginia, to be dealt with by her in her own way and at her own pleasure; that it places those of her creditors who have received but six per cent. installments of interest in nine years upon an exact equality with those who, by corrupt agencies, were enabled to absorb and monopolize our means of payment; that it agrees to pay such rate of interest on our securities as can, with certainty, be met out of the revenues of the State; and that it contains all the essential features of finality."

The following article, which is the leading editorial article in the Richmond *Whig* of June 5, 1882, the organ of the "Readjuster" party of Virginia, shows what it was attempted to accomplish by the act under consideration. The especial attention of the Court is invited to the following language which it contains:

"Now, how strangely sounds the announcement that in Virginia the coupon is dead! And yet it is true!"

This the party declares was the purpose and effect of its legislation.

"THE COUPON.

"This production of Bourbon-Funderism, that was supposed to have such a "deep-rooted hold in the soil of Virginia, proves to be a plant of the most ephe-

their Governor, and a majority in each House. They immediately set about doing what they had been elected to do. What had been consolidated in 1880 into one bill, the "Riddleberger Bill," they parcelled out into three bills. One, the act attacked in this suit, provided that when coupons are tendered to a collector of taxes, he shall receive them for the purposes of identification only, and certify them to the Judge of the County Court, and that he shall immediately compel the taxpayer to pay his taxes in money by all the compulsory process used in other cases for collecting taxes. It then provides that the taxpayer may, if he choose, file a petition in the County Court, upon which an issue shall be made up to be tried by a jury. If the jury find that the coupons are

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"meral character; not at all indigenous, but one of those rare exotics that but little "thrives in our unpoetic and common-sense country, where bacon-hams and "hoe-cakes flourish and have so many relishers. The credulous were made to "believe that this financial thief of the people's rights was so firmly fixed upon "the revenues of the State by Funder legislation that no power could shake it "off. We were told by Bourbon-Funder orators and journals, inside as well as "outside of Virginia, that our poverty-ridden and war-oppressed people would as "well submit to the inevitable, and agree that brokers and bondholders should "fatten on their hard earnings; that children should grow up rude and illiterate; "that the insane, blind and afflicted should be robbed of the comforts and cures that "a Christian and civilized State should provide for them—as there was no pos-"sibility of a riddance from the coupon infamy.

"The *Whig* told the people then, as did Readjuster speakers and representa-"tives everywhere, that the *thief* that had so long robbed them, and so long "brought such discord in families, such rupture in ranks of parties, and general "despondency in monetary circles, should and would, sooner or later, be seized "and convicted before the country of its high crimes against the best interests of "all the people.

"If the coupon had lived in Virginia every substantial and valuable interest "would have fled. It was, at its birth and in its cradle, intended as a scheme and "device to despoil the revenues of a great State, and to compel an unconditional "surrender of its sovereignty to a syndicate of brokers. The coupon was, indeed "and in truth, a devilish machination of Funderism under the apostate Gilbert C. "Walker, to subordinate the legitimate and regular power, authority, and dignity "of a great State that he had invaded as an adventurer, to the avarice and cupidity "of the vultures that he had brought with or had gathered about him here.

"Now, how strangely sounds the announcement that in Virginia the coupon is "dead! And yet it is true! A Bourbon-Funder court held the coupon killer bill "as valid and constitutional, and put Mr. Royall and his bondholder clients out of "court. Thanks again to our Readjuster Attorney-General for this professional "achievement over the cohorts of Bourbon-Funderism, reinforced by the brokers.

"Now we have had in the Hustings Court of this city (May Term) one coupon "case, that occupied the time of that court for days, and the testimony developed "in that trial is of so damaging a character that he is a reckless man who would "invest in this latter-day trick of financial sharks.

genuine coupons and legally receivable for taxes, the Court shall enter a judgment to that effect, whereupon the treasurer shall return his money to the taxpayer and receive the coupons. It provides further, that whenever a *mandamus* shall be applied for to compel a collector to receive coupons for taxes, the Court shall, before making any order, require the applicant to pay his taxes in money. It shall then certify the coupons to the County or Hustings Court, which latter Court shall cause a jury to pass upon the genuineness of the coupons, and if the jury find them to be genuine, the Court shall award the mandamus, and the treasurer shall return to the plaintiff his money. This act took effect from its passage.* Another

"The coupon is not signed by the hand of anyone—it is a mere facsimile of a "handwriting, and exposed to all possibilities and opportunities for counterfeiting. So lax and irregular has been Bourbon-Funder law, that both the Second "Auditor's and Treasurer's offices have afforded rich and peculiar chances for "duplicating or repeating often the coupons returned therein.

"For a week Attorney-General Blair, with Mr. Witt, City Attorney, were "engaged in this coupon case. Every inch of legal ground was contested by them, "and the court *instructed* the jury that under the new law it was incumbent "on every coupon-holder to prove to the satisfaction of a jury the genuineness "and legality of his coupon before it could be received for taxes. How can this "be done? Who will seek the burden of doing so? It were better for all con-"cerned to recognize the fact that the coupon is dead, because it is virtually and "legally impossible to prove it to be genuine. Who saw it made? Who saw the "facsimile impressed? Could one man not do both as well as another? The poor "old Commonwealth has already been well bled by this new idea of Funderism, "but we thank the country and all its people that the present jury trial had elicited "such facts that no man can confide in the "cut-worm" any longer.

"We promise in a short while to publish the evidence certified by Judge George "L. Christian, in this first coupon case, and then we will rest contented with the "verdict of the people. Each case requires a separate trial, and it will be rare "sport for the poor broker to pay a brace of lawyers a fifty-dollar fee to prosecute "a $3 or $30 coupon.

"From the foregoing we deduce this moral: that the holders and owners of "money will do well to invest in land, cattle, merchandise, factories, or some "legitimate business avocation that is honest and profitable in its conduct and "results. We will refer to this good result of our coupon-killer cases often."

* It is as follows:

CHAP. 7.—*An Act to Prevent Frauds upon the Commonwealth and the holders of her securities in the collection and disbursement of revenues.*

APPROVED JANUARY 14TH, 1882.

Whereas, bonds purporting to be the bonds of this commonwealth, issued by authority of the Act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law;

one, to go into effect December 1st, 1882, was the preceding one in substance, except that it did not provide for a jury trial. That is to be found at page 37, Acts of 1881–82. A third, to be found Ib., page 88, provided for funding the debt in bonds for a little more than half of the existing bonds and bearing three per cent. interest, whereas they bore six. This act, by its 15th section, forbids the payment of interest upon any bonds, except those to be issued under its provisions. The act is printed as Appendix D, of this brief.

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And whereas, other such bonds are in existence which are spurious, stolen or forged, which bonds bear coupons in the similitude of genuine coupons, receivable for all taxes, debts and demands due the commonwealth ;

And whereas, the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts and demands ;

And whereas, genuine coupons from genuine bonds, after having been received in payment of taxes, debts and demands, are fraudulently reissued, and received more than once in such payments ;

And whereas, such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts and demands due the said commonwealth, and at the same time defrauds her out of her revenues;

Therefore, for the purpose of protecting the rights of said bondholders and of and of enforcing the said contract between them and the commonwealth, preventing frauds in the revenue of the same,

1. Be it enacted by the General Assembly of Virginia, That whenever any tax-payer or his agent shall tender to any person whose duty it is to collect or receive taxes, debts or demands due the commonwealth, any papers or instruments in print, writing or engraving, purporting to be coupons detached from bonds of the commonwealth issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts and demands, the person to whom such papers are tendered shall receive the same, giving the party tendering a receipt stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such tax-payer to pay his taxes in coin, legal tender notes, or national bank bills, and upon payment give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the tax-payer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county or hustings court of the city, in which such taxes, debts, or demands are payable. The tax-payer shall thereupon be at liberty to file his petition in said county court against the commonwealth. A summons to answer which petition shall be served on the commonwealth's attorney, who shall appeal and defend the same The petition shall allege that he has tendered certain coupons in payment of his taxes, debts and demands, and pray that a jury be impanelled to try whether they are genuine, legal coupons, which are legally receivable for taxes, debts and demands. Upon this petition an issue shall be made in behalf of the commonwealth which shall be tried by a jury, and either party shall have a right to exceptions on the trial and

These three acts constitute the "Riddleberger Bill" of 1879–80, differing in nothing from that save the additional embarrassment of a jury trial which that did not provide for, and it has always been openly and notoriously claimed by all the members of the "Readjuster" party that the purpose of all these acts was to *force* the bondholders to fund their bonds in the bonds provided for by them. The same legislature, after this suit was commenced, passed a still further and independant act, forbidding the Courts to issue the writ of mandamus in any case in which the State's revenues were concerned*.

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of appeal to the circuit court and court of appeals If it be finally decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, which are legally receivable for taxes and so forth, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof, shall receive said coupons for taxes and shall refund the money before then paid for his taxes by the tax-payer out of the first money in the treasury, in preference to all other claims.

4. Whenever any tax-payer shall apply to any court in this commonwealth for a mandamus to compel any person authorized to receive or collect taxes, debts or demands due the commonwealth to receive coupons for taxes, it shall be the duty of such person to make returns to said mandamus, that he is ready to receive said coupons in payment of such taxes, debts and demands as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made shall require the petitioner to pay his taxes to the tax-collector of his county or city, or to the treasurer of the commonwealth, and upon filing the receipt for such taxes in such court the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county or hustings court of the city where such taxes are payable, and direct such court to frame an issue between the petitioner as plaintiff and the commonwealth as defendant as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause the attorney for the commonwealth in the lower courts, and the attorney-general in the supreme court of appeals shall appear for the commonwealth and require proof of the genuineness and legality of the coupons in issue Either party shall be entitled to exceptions, and an appeal to the circuit court and supreme court of appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the mandamus shall issue requiring the coupons to be received for said taxes and so forth; and they shall be so received; and on the certificate of such judgment the treasurer of the commonwealth shall forthwith refund to the tax-payer the amount of currency or money before then paid by him out of the first money in the treasury, in preference to all other claims.

5. This act shall be in force from its passage.

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* It is as follows:

CHAP. 19.—*An Act to amend and re-enact section four, chapter one hundred and fifty-six, of the code of eighteen hundred and seventy-three, in relation to mandamus, prohibiiton, &c.*

APPROVED APRIL 7, 1882.

1. Be it enacted, by the General Assembly of Virginia, That chapter one hun-

The plaintiff in error tendered to the treasurer of the City of Richmond, whose duty it is to collect taxes due the State, a coupon from a bond of the State issued under the provisions of the Act of 1871 in payment of his taxes, which coupon the treasurer refused to receive. Thereupon he applied to the Supreme Court of the State for a mandamus to compel the treasurer to receive it, and that Court, consisting of four judges, by an equally divided bench (which is the same thing for the purposes of review here as a unanimous Court, *Hartman* v. *Greenhow*, 102 *U. S. R.*, 672), refused the mandamus, and the petitioner brought his suit here by a writ of error. The refusal of the Court to award the writ and the sustaining by it of the acts certified in its judgment to have been sustained, are the errors complained of.

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dred and fifty-six, section four, of the Code of Virginia of eighteen hundred and seventy-three, be amended and re-enacted so as to read as follows:

§ 4. The said supreme court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of mandamus and prohibition to the circuit and corporation courts, and to the Hustings court and the chancery court of the city of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice, in which a mandamus may issue according to the principles of the common law, provided that no writ of mandamus, prohibition, or any other summary process whatever, shall issue in any case of the collection, or attempt to collect revenue, or compel the collecting officers to receive anything in payment of taxes other than as provided in chapter forty-one, acts of assembly, approved January twenty-six, eighteen hundred and eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ of process has any other remedy adequate for the protection and enforcement of his individual right, claim and demand, if just.

The practice and proceedings upon such writs shall be governed and regulated, in all cases, by the principles and practice now prevailing in respect to writs of mandamus and prohibition respectively.

2. This act shall be in force from its passage.

Just exactly what is intended by this act, taken in connection with section four of the act of January 14, 1882, it is difficult to determine. I shall suppose, however, that it was intended to provide that when a coupon holder asked for a mandamus, it should be replied to him that his remedy under sections one, two and three of the act of January 14 was an adequate remedy for the protection and enforcement of his rights. If, however, the petition for the mandamus was entertained, the proceedings should be governed by the provisions of section four of the act of January 14. I shall therefore, in this argument, treat the act of January 14 just as though that of April 7 had not been passed.

# ARGUMENT.

**I.**—It may aid us in a correct consideration of the questions involved in this case to determine just what is meant by the phrase "impairing the obligation of a contract." What is the "obligation" of a contract? In the case of *Sturgess* v. *Crowenshield*, it was said: "A contract is an agreement in which a party undertakes to do or not to do a particular thing, the law binds him to perform his undertaking, and this is the obligation of the contract." This language has since been quoted by the Court in several cases. A very distinguished lawyer has furnished me the following ingenious disquisition upon the theme:

"'Pact' is the accord of the wills of parties to the subject of negotiation. '*Pact*' is radically '*Pax*.' But if the Pact be *sine causa* (without consideration), it is *nudum pactum;* but if, upon such consideration as the law regards, the law annexes *obligation* to the Pact. Obligation (*ob* and *ligatio*) is the *vinculum juris*—the chain which the law throws around the parties to a Pact binding each to its fulfillment (*e. g.*, a parole agreement for land is a Pact without obligation, but if written and signed the law attaches obligation.) Thus, *Pact plus obligation* is equal to contract—(con and traho), the drawing together by legal chain of those who are in accord (*in pace*) as to a negotiation.

"This effectual chain is the legal procedure by which the volition essential to Pact is enforced, when *Pact* has become *contract* by superadded *legal obligation.* Any essential link in that chain of legal procedure and remedy by which the contract is compelled out of the debtor's means, if broken by a law, is therefore an impairment of the *obligation* (*vinculum juris*) of the contract, and is void. If it does not impair contract, yet if it impairs the *obligation* of the contract, it is void. If the *vinculum juris* be made ineffectual, the contract, thus lacking obligation, becomes a *mere pact* again, dependent on volition alone. Contract, emasculated of obligation, becomes no more than a nude pact, and it was against this result the Constitution proposed to provide by this clause."

The idea presented here is that the remedies for enforcing

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The idea presented here is that the remedies for enforcing

performance of a contract constitute the "obligation" of the contract which the States are forbidden to impair, and this would seem to be the idea presented in the extract taken from *Sturgess* v. *Crownenshield*. This same idea is presented with great fulness and force by Professor Pomeroy in his work on constitutional law, p. 383, *et seq.*, 3d ed.

This definition is far from being satisfactory to my mind. I do not deny that the "obligation" of the contract includes the remedies for compelling performance of it. On the contrary, I maintain most emphatically that it does include them; but I also maintain that the "obligation" of the contract is far broader in its scope. It does more than to include the remedies for enforcing performance simply.

If two men enter into a contract in Maine, upon the theory that the remedies in existence when and where the contract is made constitute its "obligation," the laws of Maine providing remedies to enforce performance of contracts constitute the "obligation" of that contract. Yet if those two men should be in France when the time for performance arrives, the Courts of France will decree performance of it, or damages for non-performance, according to the laws of France, utterly ignoring those of Maine. What then becomes of the proposition that the remedial laws of Maine constitute the "obligation" of that contract? If that were true the contract would be without "obligation" outside the territorial limits of Maine.

Again: Suppose A and B should enter into a contract in Maine, A giving B his diamond in consideration of B's promise to give him, A, his gun, but, before the day for performance arrived, they should both be cast upon a theretofore uninhabited island, subject to no power and therefore having no laws. Is this contract without "obligation" because the laws of Maine cannot be resorted to to compel performance of it, and there are no laws prevailing upon the island through which performance can be compelled? Assuredly not. It has the same "obligation" upon that uninhabited island as it had in Maine, and if A can possess himself there of B's gun he may rightfully do so, and hold it against B, for the reason that the "obligation" of the contract is the same on that island as it had been in Maine.

Again: Suppose two men, casually upon an island theretofore uninhabited, subject to no power and having no laws,

should enter into a contract upon sufficient consideration, but, before the time for performance arrived, they were both restored to the jurisdiction of a civilized power. Is their contract without "obligation" because there were no laws prevailing at the place where it was made, by which performance of it could be enforced? Suppose, when his deliverers found Robinson Crusoe they had agreed to give him five hundred pounds for all the parrots, goats, monkeys and other animals they found him possessed of, and he had placed them in possession of his animals, but they had refused to pay him the price agreed on? Would the contract have been without "obligation" because no law prevailed on the island by which performance could be enforced? Assuredly not; and, when they arrived in England, the English Courts would have compelled the purchasers to pay Crusoe for his animals. What then becomes of the proposition that the laws providing remedies to compel performance of a contract constitute its "obligation"? It cannot be maintained.

What then is the "obligation" of a contract? If A deliver to B a horse in consideration of B's promise to deliver him, A, one hundred dollars on the 1st of January next ensuing, what is the "obligation" of B's contract? I answer that it is the *duty* to deliver the hundred dollars on the 1st of January, which arises out of inducing A to part with his horse, upon the faith of his, B's, delivering the hundred dollars on that day.

The "obligation" of a contract, then, is the *duty* to do the thing promised to be done, which arises out of the act of inducing another to part with his money or goods or services by making him believe that the thing agreed to be done will be done. If A makes B believe that he will give him one hundred dollars on the 1st day of January, provided B will render him a specified service, and B, thus believing that A will give him the hundred dollars on the 1st of January, actually ren-

of an individual. Under that provision of the Constitution

performance of a contract constitute the "obligation" of the contract which the States are forbidden to impair, and this would seem to be the idea presented in the extract taken from *Sturgess* v. *Crownenshield*. This same idea is presented with great fulness and force by Professor Pomeroy in his work on constitutional law, p. 383, *et seq.*, 3d ed.

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Again: Suppose A and B should enter into a contract in Maine, A giving B his diamond in consideration of B's promise to give him, A, his gun, but, before the day for performance arrived, they should both be cast upon a theretofore uninhabited island, subject to no power and therefore having no laws. Is this contract without "obligation" because the laws of Maine cannot be resorted to to compel performance of it, and there are no laws prevailing upon the island through which performance can be compelled? Assuredly not. It has the same "obligation" upon that uninhabited island as it had in Maine, and if A can possess himself there of B's gun he may rightfully do so, and hold it against B, for the reason that the "obligation" of the contract is the same on that island as it had been in Maine.

Again: Suppose two men, casually upon an island theretofore uninhabited, subject to no power and having no laws,

should enter into a contract upon sufficient consideration, but, before the time for performance arrived, they were both restored to the jurisdiction of a civilized power. Is their contract without "obligation" because there were no laws prevailing at the place where it was made, by which performance of it could be enforced? Suppose, when his deliverers found Robinson Crusoe they had agreed to give him five hundred pounds for all the parrots, goats, monkeys and other animals they found him possessed of, and he had placed them in possession of his animals, but they had refused to pay him the price agreed on? Would the contract have been without "obligation" because no law prevailed on the island by which performance could be enforced? Assuredly not; and, when they arrived in England, the English Courts would have compelled the purchasers to pay Crusoe for his animals. What then becomes of the proposition that the laws providing remedies to compel performance of a contract constitute its "obligation"? It cannot be maintained.

What then is the "obligation" of a contract? If A deliver to B a horse in consideration of B's promise to deliver him, A, one hundred dollars on the 1st of January next ensuing, what is the "obligation" of B's contract? I answer that it is the *duty* to deliver the hundred dollars on the 1st of January, which arises out of inducing A to part with his horse, upon the faith of his, B's, delivering the hundred dollars on that day.

The "obligation" of a contract, then, is the *duty* to do the thing promised to be done, which arises out of the act of inducing another to part with his money or goods or services by making him believe that the thing agreed to be done will be done. If A makes B believe that he will give him one hundred dollars on the 1st day of January, provided B will render him a specified service, and B, thus believing that A will give him the hundred dollars on the 1st of January, actually render the service, then A has come under a duty to deliver the hundred dollars to B on the first of January, and this is the "obligation" of his contract.

What, now, are we to understand is meant by this word "impair"? The lexicographers define this word thus: "To impair: To diminish, to injure, to make worse." This is Dr. Johnson's definition, the greatest of all lexicographers, but all the others agree with it. Any law, then, *which diminishes*

That this was the exact meaning of the word "obligation" in the civil law from which our law took it, see "The Science of the Law," by Sheldon Amos, p. 168.

*the duty which one has come under to perform his contract*, is a law impairing the obligation of that contract.

It will be said, in answer to this, that duty arises out of the eternal principles of right and justice, and that it is not within the scope of human power to diminish one's duty. That whilst human laws may shield a man against the mundane consequences of not performing his duty, they cannot diminish or alter the duty itself. That remains the same all the time, and nothing can diminish it one jot or one tittle. Performance alone can absolve one from a duty.

This is undoubtedly true. It is undoubtedly true that it is beyond the power of human laws to diminish a man's duty, and his duty to do the thing agreed to be done remains the same after the enactment of the law which attempts to discharge the duty as it was before. But what does this prove? If my argument upon the meaning of the word "obligation" be sound, and I cannot doubt its soundness, it proves one of two things: either that the framers of the Constitution have used language that involves an absurdity (forbidding Legislatures to diminish a duty when it is beyond the power of Legislatures to diminish a duty); or that the framers of the Constitution have not used this language in its strictest and most literal sense. Between these two we must, of course, assume the latter. If they have not used the langeage in its most literal sense, in what sense then have they used it? Upon the most elementary principles of construction we must suppose it to have been used in a sense as near as possible to its most literal sense. Now, whilst it is true that human laws cannot diminish a duty, yet human laws may very seriously diminish the value of rights which grow out of duty. Right and duty are correllative terms. If one man has a duty to perform, another has a right to have him perform it. Any law which made it impossible for A to compel B to perform his duty would be exactly the same thing, in effect, as a law which exonerated B from his duty to do the thing. In each case the duty would rest upon B's volition solely, after the law was passed. This, then, I submit, is what is meant by this language. It forbids a State to place any embarrassments whatever in the way, to prevent him who has the right, from compelling him who owes the duty, to perform that duty: since this is exactly the same thing, in substance,

as diminishing the duty to do the thing, if it were possible for human laws to diminish duty.

Far be it from me to contend that the remedies in existence when the contract is made, are not within the scope of the inhibition. They are most clearly within its protection. What I contend for is that the provision is much more far-reaching, than simply furnishing protection to them. It protects them, and also forbids all acts which throw obstacles in the way of compelling the performance of the duty. When A and B enter into a contract, the State, by permitting the contract, becomes a party to it. She agrees that they shall have the benefit of all her laws for compelling performance of the contract at that time in existence. They thereby acquire a right to have the benefit of these laws, and she comes under the duty of allowing them to have the use of them. After having come under this duty, she can not diminish that duty, any more than she can diminish any other duty. She is, therefore, forbidden to take away any remedy in existence when the contract is made.

If my definition of "impairing the obligation of a contract" be sound, there cannot be a moment's question that the act of January 14th, 1882, impairs the obligation of the State's contract. The obligation of the State's contract is her duty, and the duty of her officers to receive the coupons in payment of taxes. This act in effect forbids those officers to receive them.

This prohibition, of course, constitutes an obstacle to the coupon holder compelling the officer to perform his duty. It is, therefore, expressly within the definition.

**II.**—In considering the contract clause of the Constitution, this Court has affirmed certain propositions so frequently, so invariably, and so uniformly, that they may be now taken to be canons for the construction of that instrument, and they go directly towards the support of the definition of "impairing the obligation of contracts" which I have made. They are—

FIRST.

The same rules of law are to be applied in construing the contract of a State, as are applied in construing the contract of an individual. Under that provision of the Constitution

which prohibits States to pass laws impairing the obligation of contracts, if a State choose to enter into a contract, she lays down her sovereignty, *quoad hoc*, and becomes an individual, and her contract is to be treated just as an individual's contract would be treated.

Murray *v.* City of Charleston, 96 U. S. R., 445.
Davis *v.* Gray, 16 Wall., 232.
Hall *v.* Wisconsin, 103 U. S. R., 11.

"*The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the contract of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to change the effect of the promise, is an absurdity.*"

Murray *v.* Charleston, 96 U. S. R., 445.

"*When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*"

Davis *v.* Gray, 16 Wall., 232.

"*When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded pro hac vice, as a private person itself, and is bound accordingly.*"

Hall *v.* Wisconsin, 103 U. S. R., 11.

SECOND.

Under the constitutional inhibition a contract is not to be impaired AT ALL. It will not do to say that the contract is only slightly impaired. It must be kept just as it is made. The Constitution allows of no deviations whatever.

Green *v.* Biddle, 8 Wheat., 84.
Planters' Bank *v.* Sharpe, 6 How., 327.
Von Hoffman *v.* Quincy, 4 Wall., 552, 553.
Walker *v.* Whitehead, 16 Wall., 318.
Farrington *v.* Tennessee, 95 U. S. R., 683.
Edwards *v.* Kearzey, 96 U. S. R., 601.

"*The objection to a law on the ground of its impairiny the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are however minute or apparently immaterial in their effect upon the contract of the parties impairs its obligations.*"

Green *v.* Biddle, 8 Wheat., 84.

"*It is not by the Constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect upon its obligation, dispensing with any part of its force.*"

Planters' Bank *v.* Sharpe, 6 How., 327.

"*The obligation of a contract 'is the law which binds the parties to perform their agreement.' This prohibition has no reference to the degree of impairment. The largest and the least are alike forbidden.*"

Von Hoffman *v.* Quincy, 4 Wall., 552.,

"*It is not by the Constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.*"

Ib., 553.

"*Any impairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution.*"

Walker *v.* Whitehead, 16 Wall., 318.

"*The constitutional prohibition applies alike to both executory and executed contracts, by whomsoever made. The amount of the impairment of the obligation is immaterial. If there be any, it is sufficient to bring into activity the constitutional provisions and the judicial power of this Court to redress the wrong.*"

Farrington *v.* Tennessee, 95 U. S. R., 683.

"*It is not by the Constitution to be impaired at all. This is not a question of degree, or manner or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force.*"

Edwards *v.* Kearzey, 96 U. S. R., 601.

(This proposition, and the authorities which support it, should be considered in connection with Bancroft's "History

of the Constitution," vol. 1, chapter VI., wherein it is very clearly shown that to prohibit the States from interfering with the sacred obligation of contracts, was one of the chief motives that drove the country into adopting the Constitution and forming the Union. See also Ib., vol. 2, pp. 113–137.)

THIRD.

When a contract is entered into, the contracting parties are supposed to contract with reference to the laws at that time in existence, and all those laws enter into and form parts of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract, as well as of any other laws.

Walker *v.* Whitehead, 16 Wall., 317.
Edwards *v.* Kearzey, 96 U. S. R., 601.
McCracken *v.* Hayward, 2 How., 612.
Gunn *v.* Barry, 15 Wall., 623.
Butz *v.* Muscatine, 8 Wall., 575.

"*The laws which exist at the time and place of the making of a contract, aad where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.*"

Walker *v.* Whitehead, 16 Wall., 317.

"*It is also the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces those which affect its validity, construction discharge, and enforcement.*"

Edwards *v.* Kearzey, 96 U. S. R., 601.

"*The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.*"

McCracken *v.* Hayward, 2 How., 612.

"*The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation.*"

Gunn *v.* Barry, 15 Wall., 623.

FOURTH.

The principle that the obligation of the contract is not to be impaired at all, even in the slightest degree, applies to any attempt to meddle with the remedy for its enforcement in existence when it was made, as well as to any other part of it.

Green *v.* Biddle, 8 Wheat., 17.
Louisiana *v.* New Orleans, 102 U. S. R., 206–7.
Bronson *v.* Kinzie, 1 How., 317.
McCracken *v.* Hayward, 2 How., 612.
Louisiana *v.* Pillsbury, October Term, 1881-2.

"*It is no answer that the acts of Kentucky, now in question, are regulatives of the remedy and not of the right to lands. If those acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests.*"

Green *v.* Biddle, 8 Wheaton, 17.

The foregoing language is quoted with approbation by the Court in the cases of Bronson *v.* Kenzie, 1 How., at page 316, and Edwards *v.* Kearzey, 96 U. S. R., at page 601.

"*The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb,* qui cito dat, bis dat—*he who gives quickly gives twice—has its counterpart in a maxim equally sound—*qui serius solvit, minus solvit—*he who pays too late pays less. Any authorization of the postponement of payment, or of means by which such postponement may be effected is in conflict with the constitutional inhibition.*"

Louisiana *v.* New Orleans, 102 U. S. R., 206–7.

"*It is manifest that the obligation of the contract and the rights of a party under it may in effect be destroyed by denying a remedy altogether; or, may be seriously impaired by burdening the proceedings*

*with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one we presume would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it.*"

Bronson *v.* Kenzie, 1 How., 317.

"*If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibitions of the Constitution.*"

McCracken *v.* Hayward, 2 How., 612.

"*The inhibition upon the Courts of the State to issue a mandamus for the levy of a tax for the payment of interest or principal of any bonds except those issued under the premium bond plan, was a clear impairment of the means for the enforcement of the contract with the holders of the consolidated bonds. When the contract was made, the suit was the usual and the only effective means to compel the city authorities to do their duty in the premises, in case of their failure to provide in other ways the required funds. There was no other complete and adequate remedy. The only ground on which a change of remedy, existing where a contract was made, is permissible without impairment of the contract, is that a new and adequate and efficacious remedy be substituted for that which is superseded.*"

Louisiana *v.* Pillsbury, Mayor, October Term, 1882–82.

FIFTH.

It has been repeatedly affirmed by the Court that one means of proving that legislation has impaired the obligation of a contract is the fact that it has diminished its value—market value is of course meant.

Planters' Bank *v.* Sharpe, 6 How., 327.
Von Hoffman *v.* Quincy, 4 Wall., 553.
Edwards *v.* Kearzey, 96 U. S. R., 601.

"*One of the tests that a contract has been impaired is, that its value has by legislation been diminished.*"

Planters' Bank *v.* Sharpe, 6 How., 327.

"*One of the tests that a contract has been impaired is, that its value has by legislation been diminished.*"

Von Hoffman *v.* Quincy, 4 Wall., 553.

"*One of the tests that a contract has been impaired is, that its value has by legislation been diminished.*"

Edwards *v.* Kearzey, 96 U. S. R., 601.

* * * * * * * "*This impairs its obligation by making it less valuable to the creditor.*"

Edwards *v.* Kearzey, 96 U. S. R., 601.

**III.**—The first of the acts of Assembly complained of on this writ of error, impairs the obligation of the contract in two ways.

1st.—By forbidding the collectors to receive conpons for taxes when the contract of the State is that she will receive them for taxes.

*a.* When the act directs the collectors to receive them for identification, and to immediately compel the taxpayer to pay his tax in money, it is the same thing as though the act had forbidden him to receive coupons, in terms.

2d. By imposing burdensome conditions upon the writ of mandamus when it is applied for to compel collectors receive coupons for taxes, which conditions no law required when the coupon contract was entered into, and the writ of mandamus was the existing and appropriate remedy for compelling performance of the contract when it was made.

**IV.**—The contract being that the State will receive the coupons for taxes, it is an express repudiation of the contract altered or abolished. Consequently the Court says, at page

stitution forbid her to do this, and this Court has many times held that she cannot do it. The cases are

Woodruff *v.* Trapnall, 10 How., 96.
Furman *v.* Nichol, 8 Wall., 44.
State *v.* Stoll, 17 Wallace, 425.
Hartman *v.* Greenhow, 102 U. S. R., 672.
Keith *v.* Clark, 97 U. S. R., 454.

She cannot now be held to have the power to do it without doing violence to the express terms of the Constitution, and without overthrowing the long line of decisions of this Court, which have become the very corner-stones in our system of jurisprudence.

In all the history of this Government there is not one word or syllable in the way of official utterance which gives countenance and support to the act complained of, except the case of *Tennessee* v. *Sneed*, 96 U. S. R., 69.

That case is, undeniably, squarely at issue with the cases cited, and either they must be abandoned to follow it, or it must be abandoned to follow them.

That case undoubtedly held that the State of Tennessee might enact a law forbidding her officers to receive certain bank notes in payment of taxes, although she had entered into a contract that they should receive them for taxes. But how that ruling is to be reconciled with all the other rulings of this Court, and with the express terms of the Constitution, it is difficult to understand.

The Court is, therefore, most respectfully asked to reconsider the ruling in that case.

**V.**—Those who maintain the validity of the act under consideration, say that the provision directing collectors to refuse to receive coupons is not to be considered by itself, but it is to be considered as part of a general scheme for changing the remedy to enforce performance of the contract. They say that it is within the undoubted power of a State to abolish one remedy for enforcing performance of a contract if another equally good is provided, and that the whole purpose of this act is simply to change the remedy, and that while it abolishes one it substitutes another equally good.

It cannot be denied that it has been frequently asserted in this Court that a State may alter the remedy for enforcing

For further remarks on the case of Tennessee *v.* Sneed, see post p. 117.

performance of a contract—that she may abolish one remedy provided she substitutes another that is *just as good*. Whilst this has been frequently asserted, here and elsewhere, yet I call attention to the fact that it rests wholly upon *dicta*. It was first asserted by Chief Justice Taney in *Bronson* v. *Kinzie*, 1 How., 311, in a case in which the particular act under review was pronounced unconstitutional. It was, therefore, said wholly as argument and illustration. So, whenever it has been repeated in this Court, it has been in cases in which the Court *did not* sustain a change of remedy in existence when the contract was made and entered into. I say this, notwithstanding the cases of *Sturgess* v. *Crowninshield* and *Tennessee* v. *Sneed*. Sturgess *v.* Crowninshield held that a state might abolish imprisonment for debt, but the decision is placed upon the ground that imprisonment for debt is not a remedy, but a barbarous punishment. See p. 200, 4th Wheat.

In *Edwards* v. *Kearzey*, 96 U. S. R., the Court say, at page 602, speaking of this case: "Imprisonment for debt is a relic of ancient barbarism. It has descended with the stream of time. It is a punishment rather than a remedy. It is right for fraud, but wrong for misfortune. It breaks the spirit of the honest debtor, destroys his credit, which is a form of capital, and dooms him, while it lasts, to helpless idleness. Where there is no fraud, it is the opposite of a remedy. Every right-minded man must rejoice when such a blot is removed from the statute book."

In *Tennessee* v. *Sneed*, no remedy in existence when the contract was entered into was changed or abolished. This Court ascertains what are the local laws of a State by consulting the decisions of the highest Court of that State. The Supreme Court of Tennessee certified to this Court that mandamus was not a remedy, in existence in Tennessee when the contract under consideration in *Tennessee* v. *Sneed* was entered into, by which performance of the contract could be enforced.

The rule of this Court that it looks to the decisions of the highest Court of a State to determine what are the local laws of that State, compelled it, therefore, to accept this statement as true. It therefore did not have a case before it in which a remedy, in existence when the contract was made, was either altered or abolished. Consequently the Court says, at page

73: "The question discussed by Mr. Justice Swayne in *Walker* v. *Whitehead* (16 Wall., 314), of the preservation of the laws in existence at the time of the making of the contract, is not before us. The claim is of a subsequent injury to the contract."

It is true the Court has come in one vote of sustaining a change of remedy in existence when the contract was made; but it wanted that one, and did not, therefore, give its sanction to it.

In *Douglas & Jackson, ex. rel.* v. *Gaillard*, passed on at October Term, 1879, the Court, consisting of eight Judges, divided equally upon the question of sustaining or condemning a law which would seem to have repealed a remedy existing when the contract was made. See an account of this case in 1 Am. Law Rev. (N. S.), 361, 452.

It can, therefore, be affirmed that while Judges of this Court have frequently affirmed the proposition that a State may change or abolish a remedy, in existence when the contract is entered into, provided it substitutes a new remedy as good and effective as the old one, yet the Court has never yet sustained a law which abolished or altered a remedy in existence when the contract was made. Whenever a case comes before the Court in which a remedy existing when the contract was entered into, is abolished and another one *just as good* is substituted—as, for instance, the abolishment of assumpsit, and the substitution of debt, or *vice versa*—perhaps the Court will sustain the change. The act will, however, come laden with suspicion if the contract is the contract of the State herself; for the inquiry will naturally be made, if the second act is the same in substance as the first, why make the change?

Now, while it is true that the doctrine under examination has been frequently announced by jurists of the highest repute (and, therefore, it must be supposed to be founded on what is solid), what must we understand it to mean? The Court has too often held that all the laws providing remedies, in existence when the contract is made, enter into and form part of the contract—that the contract is not to be impaired in the smallest particular—and that this principle applies to changes of the remedy as well as to all other parts of the contract—the Court has, I say, too often held these propositions for it to be supposed that in announcing the doctrine under consid-

eration it was intended to repudiate or overthrow either one of these. It must be supposed, therefore, that it is intended that the three propositions mentioned shall stand, and that the doctrine examined shall likewise stand and be made consistent with the others. How can this be? How can it be said that the existing remedy may be abolished entirely, and yet that the remedy shall not be impaired in the slightest degree?

It is done by applying to the case the doctrine "De minimis lex non curat." It is an elementary principle in the law that there may be injuries and wrongs, which the law confesses to be, logically, injuries and wrongs, which are yet so trifling as to be unworthy of notice, and, therefore, injuries and wrongs for which it will not undertake to furnish redress, and this principle is embodied in the maxim, "De minimis lex non curat." If, in point of fact, when the change of remedy is made, the contract holder's situation is left just as desirable as it was before the change was made—as, for instance, that he must use debt instead of assumpsit, or assumpsit instead of debt—then the law says to him that his injury is so trifling that it will not be considered. And this, I submit with confidence, is all that is intended by the doctrine that a State may change the remedy provided she substitutes one just as good. The substitution must work an injury which is so slight that the Court can say it is within the prinple "De minimis," &c., or it will be declared void. And this, this Court has announced to be the meaning of the doctrine. In *Edwards* v. *Kearzey*, 96 A. S. R., Mr. Justice Swayne, in speaking for the Court of the doctrine as it was announced by Chief Justice Taney in *Bronson* v. *Kinzie* says, at page 604, "The learned Chief Justice seems to have had in his mind the maxim, "De minimis," &c. Upon no other ground can any exemption be justified. "Policy and Humanity" are dangerous guides in the discussions of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it."

It may, therefore, be affirmed with confidence, that there is no more warrant in the Constitution or in the decisions of this Court construing the Constitution, for a State impairing the obligations of a contract in order that the remedy may be changed, than there is for her impairing it to accomplish any

other purpose. If she can change the remedy without impairing the obligations of the contract *in any material particular*, then she may change it. But if the change impairs the obligation in any material particular, the act is as clearly forbidden as any other act. The doctrine is nothing but a declaration that the principle, "De minimis lex non curat" applies to acts alleged to impair the obligation of contracts, and nothing more.

Now the act under consideration undoubtedly impairs the obligation of the contract, for it forbids coupons to be received for taxes when the State contracted that they should be received for taxes, and it forbids resort to the writ of mandamus except under burdensome conditions which burdensome conditions did not exist when the contract was made, and the second act forbids resort to it altogether. Can it be said that this impairment of the obligation is such an one as can be brought within the principle, "De minimis, &c."? It would be absurd to say that it is. Before the passage of the act, every collecting officer in the State was bound to receive a coupon whenever it was tendered to him, and the officer who refused to receive it became a wrongdoer, and took upon himself all the perils of a wrongdoer. Now, however, if the act be valid, he is no wrongdoer if he refuses it, but on the contrary, he is expressly commanded by the act to refuse it, and he is a wrongdoer if he does receive it. Before the passage of the act, the officer who levied for taxes after a coupon was tendered to him made himself a tresspasser and became liable to all the risks and penalties of a trespasser. Not only did he make himself liable to actions and damages for his trespass, but he subjected himself to the risk of losing his life at the hands of the injured citizen defending his property.

Before the act a suit in one case, in order that the law might be ascertained and made known, was all that was required. Each officer knew, after judgment in that suit, by the highest Court in the State, that he must receive the State's coupons in payment of taxes due to her. Now there must be a suit in each particular case, though the coupon sued on is confessedly the coupon of the State.

And what does the suit required by the act mean? The bonds are all engraved from a plate. Now, while each bond itself is signed by the treasurer, yet the coupons have only his signature engraved upon them. If strict proof of these

coupons being the coupons of the State is to be called for, the person who knows of his own knowledge that the State actually issued them as and for her own coupons must be produced. This, of course, can only be done by producing the officer of the State who issued them, or the person to whom they are issued, who must then be able to swear that he knows the coupon in question to be one of those put out by the State. Now, whilst the officer might possibly make this oath, yet, as the bonds are payable to bearer, and change hands by the hundreds of thousands every day, if the officer were dead, or could not be got at, it would be very difficult, if not impossible, to get the necessary proof from the person to whom it was issued. If that person had remained the owner of the bond, he could swear that the coupon was issued to him. But when the bond has gone out into the market, then, if the person to whom it was issued could be found, it would naturally be impossible for him to swear that the coupon in question was one of those issued to him. And where the sources of strict proof are so few, how is it possible that any practicable progress can be made in proving the genuineness of each particular coupon. To prove the genuineness of each coupon would require each year not less than a hundred thousand suits (the large majority of tax-payers paying but small taxes), and how can the two or three officers who possess the knowledge necessary for proving the coupons to be genuine be made available witnesses in all that prodigious mass of litigation, progressing at the same time in every quarter of the State.

Again, the act requires the coupon holder to surrender his coupons to the custody of the County Judge, that the necessary litigation may take place. The County Judge is not a bonded officer, and there is nothing in the law to make him responsible if he loses or misappropriates the coupons. Indeed, supposing him to be perfectly honest, what means has he for preserving the coupons securely? The law of Virginia makes no provisions for places of safe-keeping for the use of County Judges. When the coupon holder turns his coupon over to the County Judge, therefore, he does it, trusting exclusively to the honesty and care of the County Judge. He does it, knowing that the Judge must carry the coupons in his pocket until they are returned to him. It being known all over the land that the County Judges now in office in Virginia were put into office by the "Readjuster" party for the express pur-

pose of destroying the coupons, confidence in them is not strongly invited. On this point, see Appendix E.

In view of all these considerations, is it possible to say that the change in the coupon holder's situation, wrought by this legislation, is so trifling as to be within the principle, "De minimis lex non curat?" It would be a mockery of all justice to say so.

There has been tried in the Hustings Court of Richmond City, one cause under the provisions of this act, and a certified copy of the record in that cause is filed with the Clerk as an exhibit in this case. It is also printed as Appendix F of this brief. The Court can perceive by inspecting that record what it is to comply with the requirements of the act. In the absence of the witnesses Shackleford and Rogers, how would it be possible to prove the genuineness of the coupons? And how can their attendance be secured in the thousands of suits that must be brought in every quarter of the State?

By looking into that record the Court will perceive that the entire power of the State was exerted throughout several days to defeat the plaintiff, and so the entire power of the State would be exerted in each one of the thousands of suits that the act makes necessary.(*)

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(*). The following is from the Richmond *Dispatch* of October 6th, 1882:

"POWHATAN COUNTY.

TIRESOME TRIAL UNDER THE COUPON-KILLING ACT.

(*Correspondence of the Richmond Dispatch.*)

POWHATAN, October 4, 1882.

Yesterday was our regular County Court day, and was thinly attended, as it is probable that most of our people were engaged in the more profitable occupation of 'pulling fodder and cutting tops.'

The only business before the court was the third attempt at a trial under the coupon-killing act. Mr. Milton McLaurine had offered the Treasurer a fifteen-dollar coupon, and thereupon arose the litigation designed by the law. The first jury sworn to decide the question decided that the coupon was genuine, but the Judge set the verdict aside because against law and evidence. The next court the jury was hung, and on yesterday the same spectacle was presented. When a result will be attained no one can tell. Captain Thomas K. Weisiger represented McLaurine and Mr. Flanagan the Commonwealth."

The Richmond *Whig*, the organ of the Readjuster party, gives the following account of this case:

"THE POWHATAN COUPON CASE IN THE CIRCUIT COURT.

The coupon case of McLaurine *vs.* the Commonwealth was brought before Judge Dickinson in the Circuit Court of Powhatan, last Friday, on a motion for a writ of error. Judge Perkins, of the County Court, held that the answer filed

A most serious grievance of this law is the fact that it makes no provision for the plaintiff's costs. He must bear all of these himself, and he cannot recover them in case he succeeds. The issue which the act directs to be formed is to be between the plaintiff and the Commonwealth, and the law of Virginia is that no costs shall be decreed against the State. V. C., 1873, p. 1256, ch. 204, sec. 13. Accordingly, in the case, the record of which is filed as an exhibit, the Court refused to award the petitioner his costs. Now, the Court can perceive that in a case as long and as hotly contested as that, the plaintiff's costs are a most material matter. The costs and lawyer's fees in that suit were very nearly as much as the tax that was involved, possibly more.

The opinion delivered by Burks, *J.*, and certified in the record at page 5, should receive some notice at this point. The argument of the opinion is this:

If the situation of the coupon holder is not changed so as to be materially disadvantageous to him, then, under the decisions of the Supreme Court, he has no right to complain. Now, before the act of January 14th, 1882, the tax collector might have averred to the Court, when a mandamus was applied for, that the coupon tendered was spurious, and an issue to be tried by a jury would have been made up on this averment and the mandamus awarded or not, according to the verdict on this issue. This is all, Judge Burks argues, that the act of January 14th does, in effect. "Suppose," says the Judge, "the Legislature, upon the state of facts recited in the act of January 14th, 1882, had provided in that act that on the return in every case a jury should be empannelled in that proceeding to determine whether the coupon was genuine or no, and that the writ (peremptory) should be awarded or not according to the finding, would such a provision have been

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by the attorney for the Commonwealth was not defective simply because it was not sworn to. Judge Dickinson sustained his ruling. The verdict for the petitioner was set aside in the County Court and a new trial awarded the Commonwealth. It was insisted that the Commonwealth should pay the costs of the former trial before a new trial could be had. Judge Perkins overruled a motion to require this. He was sustained in this, also, by the Appellate Court. We are informed that the proceeding to establish the fifteen-dollar coupon in this case has cost the holder some $40. The 'cut-worm' seems to have a rough time in Powhatan."—*Whig, Oct.* 10, 1882.

With this statute thus administered, what chance is there to make its provisions available as remedies?

invalid?" This he understands to be what the act of January 14th substantially provides for.

Now, I make this answer to the Judge's inquiry: If the act had provided simply and only that when a collector believed a coupon to be spurious he should make that return to an alternative mandamus, and that upon that return a jury should try the issue, whether it was spurious or not, and that the mandamus should issue or not, according to that verdict, there would have been no reason to object to the act. It would have been mere *brutum fulmen*—a re-enactment of what already was the law. The only criticism that could have been made upon it would have been that as it was merely a re-enactment of what was already the law, grave suspicion might be entertained that it was enacted with a sinister purpose—a purpose to encourage collectors to refuse coupons without reason. But if it worked out such a result, any Court entitled to be called a Court of justice would have deprived it of its power of doing injury in this way by compelling the respondent to swear to his return when it became evident that coupons were being refused merely from caprice. Such an act, however, could have worked no substantial injury to the coupon holder, for the reason that it would have left the collector to all his responsibilities for refusing genuine coupons. He would have been left a wrongdoer, liable for all the consequences of his wrongful act, and liable for the costs of the proceedings for mandamus to which he would have unnecessarily put the coupon holder. It would therefore have taken but few suits to bring collectors to their senses and to make them careful how they refused genuine coupons.

But this is by no means the act of January 14th, 1882. The essential differences between the act supposed and the act of January 14th are these: The act of January 14th forbids collectors to receive any coupons whatever, whether genuine or not. It exonerates the respondent from his obligation to deny the allegations on which the petitioner relies to obtain the writ of mandamus, and, by making the issue one between the petitioner and the State, without making any provision for his costs, it deprives the petitioner of his right to costs where his coupon was wrongfully refused. This alters his position in a manner most damaging to him. It alters his position to this extent, that, under the law as it was, his coupons were valua-

ble to him, and although the State would not pay them at maturity, he could yet get over ninety cents on the dollar for them by selling them to the taxpayers. But under the new law his coupons are without any value whatever to him, and he can realize nothing from them. The State will not pay them, and the taxpayers refuse to buy them to have lawsuits with the State. The new law has altered his position, therefore, in a most serious manner, and it must be answered to the Judge's inquiry that for this reason it is invalid.

**VI.**—There is a very prevalent idea in parts of the United States, that, while the States of the Union are not sovereign States, yet that they have certain immunities in respect to their contracts, growing out of the fact that they are in the nature of sovereignties, which gives them a right to take liberties with those contracts that individuals have no right to take with theirs. This idea imputes to the State possession of something in the nature of letters of marque and reprisal, under cover of which she may make forays upon her contracts whenever her ideas of her convenience or her necessities make her declare it to be expedient. This doctrine is distinctly hinted at in *Tennessee* v. *Sneed*, at page 75, where Mr. Justice Hunt says: "No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man to whom delay was more important than the payment of costs."

So far as this remark was intended as a justification to Tennessee for refusing to receive the notes that she had contracted to receive, if it was so intended, it amounts to nothing more nor less than a statement that a State is not bound by her contract any longer than she chooses to be bound by it. It amounts to saying that if a State declare that the collection of her revenues will be delayed by receiving notes for taxes that she had contracted to receive, she may for this reason refuse to receive them. This is the same thing as to say that the constitutional prohibition has no relation to the contracts of States.

Now, whilst there is no advocate of State rights who is more extreme in his advocacy of them than I, yet I am not sufficiently extreme in my advocacy of them to contend for this principle. I insist that the constitutional prohibition extends to the contracts of States as well as to all other contracts, and

that when each State took her place in the Union she thereby surrendered her power to make war upon her contracts or to impair their obligation in the least degree as well as in the greatest degree, and that there is no right now in any State to impair the obligation of any of her contracts in the slightest degree, unless in a due and proper exercise of the police power, before which everything must yield. I insist that the true advocate of State rights contends as strenuously for a State being prohibited to do those things which the Constitution forbids as he does for her exclusive control over those matters, control over which has not been taken from her by the Constitution. I insist that a State's safeguard and protection in matters of contract are not in evading the obligation of contracts once made, *but in making no contracts that will prove injurious to her*, and that the true advocate of State rights *demands that a State shall be held to all the obligations of her contract if she chooses to enter into it*, and all other constitutional obligations that an individual would be held to if he had entered into it. There is nothing, therefore, in this proposition which will justify the State of Virginia in making a statute forbidding her collectors to receive coupons which she has contracted they should receive, and the provisions of the act forbidding the collectors to receive coupons, is void under the Constitution.

**VII.**—When this coupon contract was entered into, the right to enforce it by the writ of mandamus was a part of the law of Virginia. In the cases of Antoni *v.* Wright, and Wright *v.* Smith, 22 Gratt., this Court said at page 859, "and being further of opinion, both on principle and authority, that the writ of mandamus is the proper remedy in both cases—the duty of the Sheriff being purely ministerial—a peremptory writ of mandamus must be awarded in the case of Antoni *v.* Wright, and the judgment of the Circuit Court in the case of Wright *v.* Smith must be affirmed." The right to the writ of mandamus became, therefore, a part of the coupon, just as though a promise that the holder should have it had been written on the face of the coupon.

It was equally a part of the contract that he should have a right to the writ according to the forms and methods of procedure at that time regulating and governing the writ. It would be mere mockery to say that he might have the writ,

yet, that the State might so change the rules governing the practice in the suit as to make a resort to it useless. Therefore, I insist that the practice governing the writ was as much a part of the contract as the writ itself. The practice governing the writ was as much a part of the remedial law as the writ itself. Now, what was that practice?

The writ of mandamus is a common law writ, invented by B. R. to cover all cases for which the law provided no specified writ, and it therefore exists in Virginia to-day just as it existed in England under the common law, save as it may be regulated by statute.

By the course of the common law, it issued whenever the plaintiff swore to a state of facts justifying it. 3 Blackstone's Com., 111 (marg.); Tapping on Mandamus, 341 (292 marg.); Wood on Mandamus, p. 32, *et seq.*, and this has always been the law in Virginia. 4 Minor's Institutes, 328–329; 1 Rob. Pr. (old) 649.

It commanded the defendant to do the act desired, unless on a certain day he showed cause to the contrary. On the day named the defendant was allowed either of three courses—

1st. To demur to the writ or move to quash it, for the reason that supposing all the allegations of the application to be true, yet the law did not authorize a peremptory mandamus; or

2d. To plead by way of confession and avoidance; or

3d. To traverse the allegations of fact of the application for the writ.

If he did neither of these three things, a peremptory mandamus was awarded as for *nil dicit.*

The practice in mandamus was governed by the same rules of pleading, *mutatis mutandis*, as governed other actions. Tapping Mand. 390 (348 marg.), 394 (352 marg.)

In case the defendant relied upon a traverse of the allegations of fact of the application, it was necessary to traverse every material allegation of the application, and every one not traversed was taken to be true. Tapping, 391 (349 marg.) And it was necessary to traverse them directly, accurately and with certainty, or they would be held to be true and admitted. *Ib.*, 353 (marg.)

If the defendant made an evasive or frivolous or inconsequential return, the allegations of the application were at

once taken to be admitted, and a peremptory mandamus was ordered. *Ib.*, 394 (352 marg.)

Many instances of what have been held to be bad returns, upon which a peremptory mandamus was ordered, may be found in Tapping on Mandamus, at page 396 (355 marg). The common law is the law of Virginia, except as it is modified or changed by statute V. C., 1873, p. 191, §1.

There has been no deviation from the common law practice in Virginia. Commonwealth *v.* Justices, 2 Va. Cas., 9, is a striking illustration of the foregoing principles.

In that case the Superior Court had ordered the justices of ths County Court to build certain bridges. The justices made return that the convenience of the people did not at that time authorize the heavy burden which would be imposed by the erection of such bridges, &c. The return did not traverse the allegation of the application that the bridges were necessary, consequently the return was held to be no return, and a peremptory mandamus was awarded. See People v. Wasson, 51 How. Pr. R. 461, a most instructive case. The rule to be deduced from the cases is that if the plaintiff's right to the mandamus is consistent with the return, the mandamus will be awarded notwithstanding the return; and the only Virginia statute affecting the subject (V. C., 1873, ch. 151, and V. C., 1873, ch. 156, sec. 4, p. 1049) is simply an affirmance and declaration of the common law principles. This was the law of Virginia in 1871, and this law became a part of the coupon holder's contract. It became a part of his contract that he should have the writ of mandamus unless the allegations of fact contained in his petition were directly and distinctly denied.

The act of Assembly relied on by the defendant undertakes to abrogate all this in a way most injurious to the plaintiff. It says that though he swear to his allegations of fact, yet he shall not have the writ until he has done something more—to wit, gone through the process of a vexatious and harrassing law suit, although the contract was that he should have the writ upon swearing to the alleged facts; and it exonerates the defendant from his obligation to traverse the plaintiff's allegations of fact, although the contract was that when the plaintiff swore to his alleged facts he should have the writ unless the defendant denied those alleged facts. The case cannot be distinguished from Walker v. Whitehead, 16 Wallace, 318.

**VIII.**—The act is in the nature of a confession and avoidance. It admits that it impairs the obligation of the contract, as I understand it, but it shambles into Court pleading the baby act—pleading that a very unhappy and unexpected emergency has arisen since the contract was entered into which justifies the State in impairing its obiigation just a little.

I demur to the plea, whether to that part which sets up a justifying emergency, or to that part which extenuates because of the amount of impairment, or to both parts taken together. I care not whether there be in existence forged bonds or forged coupons, or spurious bonds or spurious coupons, or counterfeit bonds or counterfeit coupons, or coupons once redeemed which have been since stolen and put into circulation. I care not if there be all of these, and I care not in what quantity each may exist. Yet the State of Virginia is not justified in passing any law that will in the least impair the obligation of the contract which she entered into with this plaintiff when she made the coupons which he holds. If the same rules are to be applied for construing a State's contract which are applied in construing an individual's, there cannot be one moment's question about this.

There is no proposition in the law of contracts better settled than this: that if a party would take advantage of great hardships in ease of the obligation of his contract, he must have stipulated in the contract itself for the right to take advantage of them. If in the contract itself there is no reservation of a right to do less than the contract calls for, the party is conclusively presumed to have agreed to do what he contracted to do, never mind how difficult and burdensome its performance may have become. Amongst the hundreds of cases that might be cited for this familiar principle I refer to those of Dermot v. Jones. 2 Wall. 1, and the Harriman, 9 Wall., 161. The law is admirably summed up in the latter case at p. 172.

If an individual had made the contract which the State has made, he would have been compelled to perform it just as he made it, without regard to hardships and difficulties. So, if the same law is to be applied to the State, she will be required to perform her contract just as she made it. If she had desired to change the character of her obligation, she should have stipulated for the right when the contract was made. She should have stipulated that she should not be compelled to

receive the coupons for her taxes in case forged or counterfeit coupons should get into circulation. She did not stipulate for this, and she cannot now alter the character of her contract because there may be such.

**IX.**—But supposing the alleged state of facts would justify the State in impairing the obligation of her contract "just a little," I deny that the facts recited in the preamble to the act exist.

Can I be permitted to contradict the averments of the preamble, or is the Court bound to assume them to be true?

Whatever may be the rule as to averments of fact in the preamble to an act of Parliament, or in the averments of an act of Congress, or a State Legislature, when it is not alleged that such act is one of those prohibited by the Constitution, yet I affirm with confidence that when an act is attacked as being forbidden by the Constitution, the act itself cannot be permitted to prove a state of facts which would justify the act. If a certain state of facts will justify the Legislature in passing an act to impair the obligation of contracts, then the act itself cannot be allowed to prove that those facts exist. The Court must inquire *dehors* the act whether the facts exist, and if they are thus found to exist, then it will adjudge the act good. But if the act is to prove that the facts exist, then the constitutional inhibition would amount to nothing. In order to escape the inhibition, all that the Legislature would have to do would be to falsely recite the necessary facts, and the Constitution would be defied. No such principle can be tolerated for a moment. If a given state of facts will justify an act impairing the obligation of a contract, the Court must first ascertain whether the facts exist, and then consider whether those facts justify the act.

But it has never been held that even an act of Parliament, uncontrolled as Parliament is, can furnish conclusive proof of facts. In Rex *v.* Sutton, 4 Maule & Selwyn's R., 532, the recitals in the preamble of an act of Parliament were admitted to prove a *prima facie* case, but the Court took care to limit their effect to proving the case *prima facie* only, allowing the defendant to contradict them.

But the American doctrine repudiates even this limited effect to recitals in an act. The doctrine in this country is that recitals of fact in the preamble to an act are worth nothing but

to show *that it was represented to the Legislature that such a state of facts existed*, and that the Legislature for that reason was moved to pass the act. The subject was first philosophically considered in the case of Elmendorf *v.* Carmichael, 3 Litt. (Ky.), R., 480, and effect refused to the recitals for the reason that it is not the province of the Legislature to find facts. That is a judicial function—not a legislative function.

Sedgwick, Stat. and Const. Law, 2 ed., p. 44.
Cooley Const. Lim., 96 (marg.).
Parmlee *v.* Thompson, 7 Hill, 80.
Duncombe *v.* Prindle, 12 Iowa, 1.
U. S. *v.* Claflin, 107 U. S. R., 546.

The rule is the same for public and general laws as for private laws.

Sedgwick, Const. L., 2d ed., 44.

The journals of each body of the Legislature, with the documents that they contain, may be referred to to show that the allegations of the preamble are not true.

1 Greenl. Ev., § 491.
Watkins *v.* Holman, 16 Peters, 56.
Root *v.* King, 7 Cowen, 613.
Spangler *v.* Jacoby, 14 Ill., 299.
Jones *v.* Randall, Cowper, 17.

In the year 1880, the House of Delegates appointed a committee to examine the Second Auditor's office to ascertain whether there were any forged, counterfeit or stolen coupons. That committee made its report (a most elaborate one, covering 300 printed pages), which is House Document No. 2, of the session of 1881–82. The committee was unable to ascertain that there was a single forged or counterfeit bond or coupon in existence, and of the millions of dollars of coupons that have been paid into the treasury since 1871, they were unable to find but $91,686. All the others were in place. The law makes it the duty of the officers of the State to cancel the coupons as soon as they are received, so that the Court must assume that these coupons were all cancelled as the law required of the officers. Besides, of the $91,686, $63,489 were paid in by S. G. Tinsley, and the report shows Mr. Tinsley's statement that all the coupons which he ever

paid in were cancelled. (The committee's report is Document No. 2, of the session of 1881–82, which is contained in the Journal of the House of Delegates for that year, which is filed with the clerk. Nine copies of this report are bound up in nine copies of this brief, one for each member of the Court.) The matter, therefore, is reduced to this, that there may have been stolen from the Auditor's office $28,197 of coupons after they were redeemed, and the State may be called on to redeem them a second time if they are not cancelled. But since it was by law the officer's duty to cancel them, the Court must presume that they were cancelled.

But suppose they are not cancelled. Are the bondholders to blame for it? Whose fault is it that they have been put into circulation? The State's own officers let them go out.

In addition to the foregoing report, to prove that the allegations of the preamble are not true, the Court is referred to House Journal, 1882, p. 103, resolution of Mr. Lyons, and House Journal, p. 108, resolution of Mr. Lyons, and House Documents Nos. VI. and VIII., in response thereto, and Senate Documents Nos. IX., X., and XV., 1882. The Senate and House Journals for 1881–82 are filed with the clerk. Two of the documents referred to are printed below as a foot note. These are communications to each House by the Second Auditor, who is by law the custodian of all the papers relating to the State's debt. It is to his office that resort must be had for information touching the debt in any respect.*

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* House Document No. VIII. (House Journal for 1881–2.)

Commonwealth of Virginia,
Second Auditor's Office,
Richmond, January 9th, 1882.

*To the* Honorable I. C. Fowler, *Speaker of the House of Delegates:*

Sir,—In response to the following resolution of the House of Delegates:

"That the First Auditor, Second Auditor and Treasurer of Virginia be, and they are hereby severally requested to furnish, as soon as possible, the following information:

"*First*, Whether any counterfeit or forged obligations of the State of Virginia have in any way come to their knowledge.

"*Second*, If so, of what kind were the said forged or counterfeit obligations, bonds, coupons or certificates; their number, den mination, and amount; when and by whom presented; and what action, if any, has been taken in regard thereto."

I have the honor to report that no counterfeit or forged obligations, bonds,

The matter is reduced therefore to this, that there may possibly be $28,197 of coupons in circulation, which have once been redeemed, which the negligence of the Commonwealth's officers and agents has allowed to get into new circulation, and for this paltry sum the State is to repudiate all interest upon her debt, and to brand the millions of dollars of her coupons which are yet to be redeemed.

**X.**—In substance, this act takes away the coupon-holder's remedy to compel a redemption of his coupon, and it supplies him with no other remedy whatever. The remedy which it pretends to give is not a remedy to compel the reception of his coupon. It is a remedy to compel the State to perform her alternative promise—that is, to pay interest upon her bond.

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coupons or certificates of the State of Virginia, have in any way come to my knowledge.

I am, respectfully,

H. H. DYSON,
*Second Auditor.*

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SENATE DOCUMENT No. XV. (Senate Journal, 1881–2.)

COMMONWEALTH OF VIRGINIA,
SECOND AUDITOR'S OFFICE,
RICHMOND, January 16th, 1882.

*To the* Honorable JOHN F. LEWIS, *President of the Senate:*

SIR—To the following resolutions of the Senate:

"That the Auditor of Public Accounts, Second Auditor and Treasurer, are requested to furnish the Senate the following information:

"*First.* Have they or either of them any reason to believe that there are in existance spurious, stolen or forged bonds, purporting to have been issued under the act of March 28th, 1879, entitled an act to provide a plan of settlement of the public debt.

"*Second.* Have any such bonds been presented for exchange or transfer, and if so, state the number, character and denomination of such bonds, and the names of the person or persons in possession of same.

"*Third.* Have any coupons ever been presented for payment, or actually paid, which were spurious, stolen or forged, and in the similitude of genuine coupons issued under the act aforesaid. If so, to state the amount of such conpons in the aggregate, their several denominations, when they matured, the numbers of the several bonds from which they have been detached and purposed to represent the semi-annual interest upon, and the names and residences of the persons from whom they were received.

"*Fourth.* The same data and information respecting spurious and stolen or forged bonds and coupons purporting to have been issued by authority of the act of March 30th, 1871, entitled an act to provide for the funding and payment of the public debt, and in similitude of genuine bonds and coupons issued thereunder."

I have the honor to reply that I have no knowledge of any spurious or forged

The State made two promises in the alternative. The first was, that she should pay the interest upon her debt at her treasury. The second one in the alternative was, that if she did not pay it, the tax-payer might pay his taxes with the coupon. She now repudiates her first promise to pay the interest, and the act under consideration forbids the tax-collector to perform her second alternative promise, and when the tax-payer seeks to compel the collector to keep the State's second promise this act heads him off, and pretends to furnish him means for making the State perform her first promise to pay interest in money. If it should be sanctioned it would be equivalent to saying to the State, "You may do the wrong of repudiating your first promise; you may do the wrong of repudiating your alternative promise, and when it is attempted to compel you to perform your second promise, you may escape performance of it by making a false pretense of performing your first promise. In other words, you may take advantage

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bond or coupons issued, or purporting to have been issued under either of the said acts. As to any bonds or coupons that may have been stolen, I have heard of none issued under the act of March 28th, 1879, nor have I any knowledge of any issued under act of March 30th, 1871, except such information as as may be contained in the report made to the Legislature, March 30th, 1874, by the Joint Committee to investigate the Sinking Fund, printed in House Document No. 6 for 1874, in which a deficiency of $15,939.89 of bonds, and of $1,325.45 of interest is stated.

There was some double funding of bonds, as stated in a report made to the Legislature by the Joint Committee to examine the offices of the Second Auditor and Treasurer, printed in House Document No. 9 for 1878–79, but these were State bonds that were issued prior to the passage of the funding act of March 30th, 1871.

Very respectfully,

H. H. DYSON,
*Second Auditor.*

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By examining the testimony of the witnesses contained in appendix F, the Court will see the following:

John L. Shackelford had been a clerk in the Second Auditor's office about twenty-five years, and was familiar with the coupons issued under act of March 30th, 1871; had handled about seven millions of said coupons, and had never seen or heard of a counterfeit coupon.

W. N. Newman, who was introduced as a witness for the State, testified that he had been connected with the Treasurer's office for the greater part of ten years; that he was familiar with the conduct and management of both the Second Auditor's office and the Treasurer's office; that "he had never heard of a duplicate or a forged coupon."

of your first wrong as a means for perpetrating a second wrong."

This change in the contract to be enforced might be a serious thing for the coupon-holder. Relying upon the State's promise to receive the coupon, a tax-payer might put all his money into a coupon. He might have no money when the treasurer came for his taxes—only this coupon. The treasurer refuses it and levies upon his only horse. The horse is sold at a sacrifice, and brings no more than enough to pay the tax, and the poor farmer makes no crop that year. It is but poor consolation to the tax-payer to know that he can get his money back after a vexatious and expensive lawsuit between himself and the State, in her own Court, opposed by her law officers, and before a jury whose sympathies are in deadly hostility to his coupon; whereas, if the State had performed her promise to receive the coupon his tax would be paid, and he would be cultivating his field with his horse.

I submit, therefore, that all remedy to compel performance of the State's contract to receive the coupons is taken away, and no remedy to compel performance of *that* contract is given. The collectors are forbidden to receive coupons, and the Courts are prohibited to issue mandamuses to compel reception of them, and there is no other act known to the law to enforce reception of them. The coupon-holder is therefore absolutely without remedy to enforce performance of the State's contract to receive coupons. The substitute provided for recovering back money wrongfully collected, may be held to be redress for a wrong that has been perpetrated, but there is no principle upon which it can be held to be a remedy to enforce the coupon-holder's right, which is that the State shall receive the coupon for taxes. It proceeds upon the idea of *redressing* an admitted wrong, not of *enforcing* an admitted right.

**XI.**—But this whole act is a trick, and a dodge, and a sham, and a fraud. It is an attempt to destroy these coupons and thereby to force the holders of the bonds from which they come to surrender them and take new bonds for what is substantially but one-fourth of the old ones, under the false and fraudulent pretense of being intended to protect the bond-holders in their rights, as the preamble to the act declared to be its purpose. The Constitution will not allow the State to

declare openly that she will not redeem the coupons, so she by this act attempts to rid herself of her obligation to receive them by averring falsehoods, and making her falsehoods an excuse for a measure which she says those falsehoods make necessary as a protection to the bondholders, which measure, in fact, destroys the bond. It is an attempt to destroy the coupons under the false and fraudulent pretense of being intended to protect and preserve them. It is an attempt to do a thing indirectly, which the Constitution will not permit her to do directly, and not content with the disgrace of an attempted evasion, she attempts to cover her real purpose by the averment of flat falsehoods, of which each body of the Legislature that enacted the law had official proof before it when it enacted it, as the Court will see by consulting the documents referred to in paragraph VIII. of this brief in the House and Senate Journals for 1881–2.

The proposition which I am about to assert may be new, but I assert it, nevertheless, with the most entire confidence that it is sound, and that it must be adopted as a rule for dealing with cases of this character. I maintain that when an act of a State Legislature is attacked as being one of those which are prohibited by the Constitution, if the Court sees reason to suspect its *bona fides*, it will treat it as the Courts treat deeds made by individuals which are affirmed to be forbidden by the statute against fraudulent conveyances.

As to those, if the Court can perceive that the maker *intended* to perpetrate a fraud, it will declare the deed void for that reason. Lord Mansfield canonized the idea in *Cadogan* v. *Kennett*, Cowper 435, when he said: "The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors?" And this language has been quoted approvingly and the idea expressed by it has been acted on in the tribunals of justice all over the civilized world. And why should not this principle be applied to a State in respect to those things which the Constitution forbids a State to do? An individual is forbidden by the statute against fraudulent conveyances, and the principles of the common law to convey away his property to persons not *bona fide* purchasers for value without notice, whilst he is in debt. Being prohibited to do this thing directly, when it is alleged that a particular conveyance by a debtor is in violation of this prohibition, the

Courts examine into all the facts and circumstances attending the transaction, and if they discover evidence which justifies the conclusion that the conveyance was intended to be a trick to defeat creditors of their just claims, they destroy the deed, notwithstanding all the formalities which may surround it. They refuse to allow that to be done indirectly which the law will not allow to be done directly. What reason is there that this principle shall not be applied to those acts which are forbidden to the States? The prohibition is as positive in their case as in the case of the individual. Why shall not the same rules of law be applied to each? It will be answered that the States are sovereign, and that a sovereign's dignity is not to be lowered by such treatment. I reply, that as to the right to wage war upon their contracts, they are not sovereign. When they entered into the Union they assented to the provision in the Constitution which forbids States to impair the obligation of contracts, and they thus surrendered their sovereign right to impair the obligation of their contracts. As to their contracts, they agreed that they would not be sovereign States, but simply corporate individuals. It is nonsense to talk of a State being sovereign, and at the same time under a prohibition. Sovereignty knows no prohibitions. Sovereignty and prohibitions are antipodes. As to their contracts, the States are only ordinary corporate bodies, governed by the same laws as other corporate bodies are governed by. Therefore, if the Court can perceive, after critically examining all the facts and circumstances connected with the acts under consideration, that they were *intended* to be acts to impair the obligation of a contract covering their real purposes and intents under false averments and pretenses, it will declare them forbidden by the Constitution for that reason.

When everything bearing upon this act which the Court is at liberty to look at is considered, its purpose becomes as transparent as the day—the proof of the fraudulent intent becomes overwhelming. In the first place, the State has neglected and refused to pay any interest upon her bonds ever since she issued them. Not only this, but the same Legislature which passed the acts which are attacked on this writ of error, within two weeks after the first one was passed (that forbidding the reception of coupons) passed the Riddleberger funding act (Acts, 1881–82, p. 88), the fifteenth section of which forbids the payment of interest upon any bonds

except those issued under its provisions, whilst inviting the holders of the State's bonds to surrender them and take her new bonds for one-half the principal, bearing only three per cent. interest, but making provision for the payment of interest on these. The intention, therefore, to escape the obligation of the coupons is perfectly clear. But these facts are to be considered along with the additional ones that the recitals of the preamble which are relied on to justify the act are false—no such facts exist—and that the act, while professing to be intended to secure the coupon-holder in his rights, works out its purposes by measures which are obviously measures of the deadliest hostility to him. Then again, not only is the Court at liberty to consider the political history of the State for the past ten years, but under its rulings it is its imperative duty to consider it.

U. S. *v.* Pacific R.R. Co., 1 Otto, 79.
Slaughter-House Cases, 16 Wall., at p. 67.
Hartman *v.* Greenhow, 12 Otto, at p. 676.

In the Slaughter-House cases the Court rely upon the history of the times to ascertain what was intended to be accomplished by the three war amendments, and refer to the knowledge that each Judge had in his own mind of that history.

The Court knows, therefore, that the entire aim of the political party in possession of the State when these acts were passed, has been, from its formation, to rid the State of her obligation to receive these coupons for taxes. This has been shouted as the party shibboleth by their stump orators from one end of the State to the other; it has been the text of every editorial article of their newspapers, (*) it has been in all their party platforms. Look also at the history of legislation in the State for the past ten years. In 1872 the Legislature passed an act ordering the collectors of taxes to refuse coupons. The Supreme Court of Appeals for the State declared this act void in *Antoni* v. *Wright.*

Agitation of the subject was kept up before the people, and a Legislature being elected in 1877 to "Readjust" the debt, it immediately passed the "Barbour Bill," set out in Appendix B, which forbade the collectors to receive the coupons. This bill failed to become a statute because the Governor vetoed it. Agitation of the subject was continued and the Readjuster party elected another Legislature instructed by the voters to "Readjust" the debt. What was its first

measure? To forbid the collectors to receive coupons, by the "Riddleberger Bill," set out in Appendix C. This also failed to become a statute by reason of the Governor's veto. Then came the decision of this Court in the case of *Hartman* v. *Greenhow*, in which it declared that the State must redeem these coupons just as she had issued them. Directly after that the "Readjusters" won another victory, electing a majority in each House and the Governor also. They thus had entire possession of the government. They immediately enacted this contemptible trick in direct pursuit of the policy which the party has proclaimed from the time it was formed, to rid the State of the coupons, and to evade this Court's decision in *Hartman* v. *Greenhow*. When all the facts relating to this subject are considered, complete, overwhelming proof is brought home of "a legislative fraud which this Court is asked to sanction by a judicial benediction."

And all this is done in the name of the ancient and revered doctrines of State rights. State rights! as though a right to perpetrate an infamous and atrocious wrong could exist anywhere—in a State or in an individual! State Rights! as though a reservation by the States of certain powers to be under their exclusive control could give a State the right to turn her back upon the solemn covenants into which she deliberately entered with her sister Commonwealths and to tear up and trample into the dirt that sacred instrument to which she put her hand and which forbids her to disturb in any degree the sanctity of her contracts! When I hear these repudiators of a just debt appealing to the principles of State rights as a cloak for their hellish and nefarious designs—when I see them thus dragging through the mire principles and tenets which the foremost statesmen and patriots of this nation have ever cherished as the very sheet-anchors of our liberties, of justice and of right—when I see them tearing down and shattering the corner-stones and pillars of the temple of justice in the name of that Justice herself, I am reminded of the Arabs of the desert, who pillage the noble ruins of antiquity for stones to construct huts and hovels in which to shelter and conceal their booty and plunder.

I know that this is terrible language to use of the act of a Virginia Legislature, and no man can feel more keenly than I the disgrace of such language being necessary. I know that this language is at war with the traditions and ideas of the

people of this whole nation, who have been taught to impute a verity to the acts and declarations of their Legislatures which admits of no contradiction, and that it will shock many of the best citizens in the land to hear that the act of a Legislature is to be treated like the fraudulent deed of a swindling debtor. But when the people were receiving the training that inspired reverence for the acts of their law-makers, Legislatures were composed of men who would have been mangled on the rack before they would have certified to the world for truth the falsehoods which the Virginia Legislature has deliberately published in this act. And if the character of the Virginia Legislature has so changed that, to accomplish an infamous purpose, it will publish as true that which was proved before it to be false, it becomes the high prerogative and duty of this Court to strip its acts of the tawdry tinsel with which it hopes they may be gilded, and to display them to mankind in all the hideousness of their naked deformity. It becomes its duty to see to it that a principle promulgated amongst the people and accepted by them in the interests of justice and right, shall not be perverted by tricks to the uses of injustice and fraud.

## COSTS.

The plaintiff in error prays that if the judgment be reversed it may be adjudged that he is entitled to his costs, both in this Court and in the Court below. The act of the Virginia Legislature, V. C., 1873, ch. 151, § 4, provides expressly that when a peremptory mandamus is awarded to a plaintiff he shall have his costs, and this act was the law of the land when the plaintiff's contract was made. It therefore became a part of his contract that if the officers of the State refused his coupons, and he was compelled to sue out a writ of mandamus to compel them to receive them, he should have his costs. He claims the benefit of this law, and prays the Court to award him his costs, and to settle the principle that in all similar litigation the plaintiff shall be entitled to his costs.

This is no trivial matter, but one of very great consequence to the holders of Virginia bonds. This is a test case, brought into this Court by the bondholders to test the question

whether the Virginia repudiators can destroy their bonds by State legislation.

It is possible that those repudiators may continue to make war upon the bondholders, even though this Court declares their present acts void. But if the Court informs the collecting officers of the State, by its judgment in this cause, that a refusal of coupons carries with it the costs to which the taxpayer may be put, collectors will be very cautious in refusing them. The fact that the collector will have to pay all the costs which he unlawfully puts the coupon-holder to is the latter's surest protection. I therefore most respectfully urge the Court to award the plaintiff in error his costs.

WM. L. ROYALL,
*For Plaintiff in Error.*

# APPENDIX A.

## *SENATE DOC. NO. XXIV.*

### REPORT OF THE SENATE COMMITTEE ON FINANCE RELATIVE TO THE PUBLIC DEBT. PREPARED BY SENATOR BRADLEY T. JOHNSON.

The undersigned, a member of the committee on finance, by permission of the committee, begs leave respectfully to present to the Senate the following statement of facts, consideration of principles, and suggestions in relation to the public debt. The Commonwealth begun, as early as the year 1820, to borrow money on the pledge of her credit, and to issue her bonds, obliging herself to repay the money so borrowed.

| | |
|---|---|
| Prior to January 1, 1852, she had obtained in this manner | $13,523,655 87 |
| And from January 1, 1852, to January 1, 1861 | 25,187,301 35 |
| | $38,710,857 22 |

Since that time she has incurred no debt which the constitution of the United States allows her to pay, except a small amount created by the "restored" government.

As it is now no less true than when Mr. Jefferson, in his first inaugural, declared it to be the first duty of patriots to preserve the public faith inviolable, and to pay the last dollar of our just obligations, it will be the object of this investigation to ascertain—

First. What is the just obligation of Virginia in regard to the debt created as above set forth;

Second. What is the ability of the State to perform such just obligation; and

Third. The manner in which it may be done, so that she may stand before the world as having fulfilled her full and perfect duty, and in her own conscience of having done that which was right and just and honest toward all men.

Of the sum of $38,710,857 22 of debt originally created, $34,323,147 72 have been actually expended on works of internal improvement within the present limits of the State of Virginia, as will appear by the following schedule showing the different works and corporations, the amounts appropriated to each, and the date of each act making such appropriation.

It is believed to be accurate, the material having been obtained from

a report of the second auditor to the General Assembly of 1870–71, by examination of the books in his office, and by reference to many members of the General Assembly to ascertain which of the works specified were wholly aud which in part within this State. This estimate does not include the million of dollars expended in the erection of the buildings of the University of Virginia and the Eastern and Western Lunatic Asylums, and the Deaf and Dumb Asylum, and five hundred thousand dollars *borrowed to pay for the monument to Washington.*

AMOUNTS EXPENDED WITHIN THE PRESENT LIMITS OF THIS STATE FOR WORKS OF INTERNAL IMPROVEMENT.

| | | |
|---|---|---|
| To Southside railroad company, act 5th February, 1853..... | $800,000 00 | |
| To Richmond and Danville railroad company, act 9th February, 1853.. | 600,000 00 | |
| To Virginia and Tennessee railroad company, act 9th February, 1853.. | 1,000,000 00 | |
| To Orange and Alexandria railroad company, act 25th March, 1858... | 400,000 00 | |
| To Virginia Central railroad company, act 9th February, 1860..... | 210,000 00 | |
| To Richmond and Petersburg railroad company, act 30th March, 1838 | 150,000 00 | |
| To Petersburg railroad company, act 29th March, 1838 ..... | 150,000 00 | |
| To Portsmouth and Roanoke railroad company, act 31st Marth, 1838.... | 150,000 00 | |
| To Winchester and Potomac railroad company, act 13th February, 1838 | 150,000 00 | |
| To City Point railroad company, act 6th April, 1839..... | 50,000 00 | |
| To James River and Kanawha company, acts 25th March, 1842, 3d June, 1853, 1st March, 1847, 25th July, 1850, 2d March, 1853, 23d March, 1860..... ..... | 2,526,000 00 | |
| | | $6,186,000 00 |
| To James River and Kanawha company, act 21st March, 1837..... | 3,515,300 00 | |
| To Alexandria canal, act 1st March, 1847..... | 272,000 00 | |
| To Dragon Swamp, act 3d April, 1838..... | 1,464.00 | |

| | |
|---|---|
| To Goose Creek and Little River, act 17th March, 1848 | 58,255 35 |
| To Hazel River, acts 30th January, 1850, and 31st March, 1853 | 63,079 58 |
| To Kempsville canal, acts 5th March, 1851, and 26th March, 1800 | 13,650 00 |
| To North river, acts 2d February, 1850, and 15th March, 1853 | 136,500 00 |
| To Rappahannock company, acts 4th March, 1836, and 3d February, 1848 | 100,000 00 |
| To Dismal Swamp, act 17th February, 1837 | 16,500 00 |
| To Appomattox company (upper), act 25th January, 1839 | 44,000 00 |
| To Smith's river, act 24th March, 1848 | 4,083 12 |
| To Rivanna river, acts 7th April, 1831, 27th March, 1837, 4th April, 1838, 26th March, 1853, 15th February, 1851, and February, 1860 | 240,759 11 |
| To James River and Kanawha company—debt contracted by the assumption of the guarantee of | 2,260,000 00 |
| To James River and Kanawha company—old James River stock | 95,000 00 |
| To Petersburg railroad, act 23d March, 1831 | 80,000 00 |
| To Winchester and Potomac railroad, act 6th February, 1834 | 120,000 00 |
| To Portsmouth and Roanoke railroad, acts 20th January, 1834, 14th March, 1835, and 20th March, 1839 | 256,650 00 |
| To Richmond, Fredericksburg and Potomac railroad, act 23d January, 1835 | 206,800 00 |
| To Richmond and Petersburg railroad, act 17th January, 1837 | 200,000 00 |
| To Chesapeake and Ohio (formerly Louisa and Virginia Central), Covington and Ohio, acts 25th February, 1837, 25th February, 1738, 8th March, 1847, 5th March, 1849, 30th January, 1850, 30th March, 1851, 15 December, 1852, and 22d March, 1853 | 2,013,987 52 |

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|---|---|
| To Covington and Ohio (merged into Chesapeake and Ohio), acts 15th February, 1853, 13th March, 1856, 20th March, 1858, and 29th February, 1860 | 3,206,461 83 |
| To Blue Ridge railroad, purchased by Chesapeake and Ohio—$70,000 was paid from tolls received—act 5th March, 1849 | 1,604,723 23 |
| To City Point railroad, now a part of Southside railroad, act 27th March, 1837 | 60,000 00 |
| To Alexandria, Loudoun and Hampshire, now Washington and Ohio, acts 15th March, 1853, and 25th March, 1858, and Fredericksburg and Gordonsville, act 1st March, 1853 | 1,017,248 00 |
| To Manassas Gap, now merged into Orange and Alexandria railroad, acts 10th February, 1851, 6th December, 1852, 7th February, 1853, 8th March, 1853, 10th March, 1853, 25th January, 1854, 25th March, 1858, and 10th February, 1860 | 2,280,000 00 |
| To Norfolk and Petersburg, now consolidated into Atlantic, Mississippi, and Ohio, acts 9th February, 1853, 13th February, 1854, 25th March, 1858, and 2d March, 1860 | 1,499,970 00 |
| To Orange and Alexandria (now Orange, Alexandria, and Manassas), acts 8th March, 1849, 27th March, 1848, 7th March, 1851, and 9th February, 1853 | 874,500 00 |
| To Richmond and Danville, acts 9th March, 1847, and 10th March, 1850. | 1,188,599 50 |
| To Richmond and York river, acts 31st January, 1853, and 25th March, 1858 | 490,999 52 |
| To Southside (now consolidated into Atlantic, Mississippi, and Ohio), act 10th February, 1851 | 480,000 00 |

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|---|---|
| The subscription of $803,500 00 was made up of stock and loans in Petersburg railroad company, Virginia and Tennessee (now consolidated into Atlantic, Mississippi, and Ohio), acts 8th March, 1849, 20th February, 1851, and 18th March, 1856 | 2,300,000 00 |
| To Virginia and Kentucky, act 3d March, 1853 | 103,438 69 |
| To Roanoke Valley, acts 4th March, 1853, 1st March, 1854, and 10th March, 1853 | 307,402 00 |
| To Boydton and Petersburg, act 16th March, 1853 | 107,685 49 |
| To Brunswick and Roanoke, act 14th March, 1853 | 24,450 00 |
| To Christiansville and Keysville, act 21st February, 1853 | 18,000 00 |
| To Farmville and Buckingham, act 18th March, 1853 | 37,568 20 |
| To Fredericksburg and Valley, acts 3d March, 1851, and 22d March, 1853 | 107,850 49 |
| To Lunenburg, act 25th February, 1853 | 37,947 27 |
| To Marysville, act 8th March, 1853 | 11,437 50 |
| To Junction Valley, acts 17th March, 1849, and 31st March, 1853 | 60,000 00 |
| To Petersburg and Jerusalem, act 24th March, 1853 | 41,422 00 |
| To Upperville and Manassas Gap, act 30th March, 1853 | 7,200 00 |

TURNPIKE COMPANIES.

| | |
|---|---|
| To Abbingdon and Patonville, act 25th March, 1823 | 6,525 00 |
| To Black Creek Valley, act 29th March, 1860 | 1,140 00 |
| To Black Lick and Plaster Bank, act 6th March, 1851 | 8,163 40 |
| To Berryville, act 4th February, 1847 | 8,000 00 |

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|---|---|
| To Berryville and Charlestown, act 22d March, 1847 | 20,455 74 |
| To Blue Ridge, acts 17th March, 1849, and 3d March, 1851 | 101,981 20 |
| To Brown's Gap, act 1st March, 1853. | 10,800 00 |
| To Buchanan, acts 15th February, 1849, and 11th March, 1850 | 5,250 00 |
| To Buchanan and Bedford, act 19th February, 1850 | 6,000 00 |
| To Buford's Gap and Buchanan, act 28th March, 1851 | 5,700 00 |
| To Cedar Creek and Opequan, act 24th March, 1851 | 6,274 50 |
| To Danville and Wytheville, acts 10th February, 1853, and 26th March, 1860 | 31,600 91 |
| To Dunkard Creek, act 24th March, 1848 | 6,000 00 |
| To El Dorado, act 9th February, 1860 | 6,599 00 |
| To Estillville, act 7th March, 1848 | 7,200 00 |
| To Estillville and Nickelsville, act 19th March, 1850 | 3,800 00 |
| To Fincastle and Covington, act 24th March, 1851 | 7,200 00 |
| To Front Royal and Gaines' Cross-roads, act 1st April, 1848 | 9,000 00 |
| To Front Royal, acts 27th March, 1848, and 17th March, 1851 | 36,000 00 |
| To Gooney Manor, act 21st January, 1854 | 3,600 00 |
| To Hardy and Winchester, act 15th March, 1849 | 23,400 00 |
| To Hazel River, act 28th March, 1851 | 8,072 31 |
| To Hillsborough and Harper's Ferry, act 9th March, 1849 | 6,000 00 |
| To Howardsville and Rockfish, acts 17th March, 1849, 9th March, 1848, and 1st April, 1853 | 31,500 00 |
| To Hot Springs and Clifton Forge, act 31st March, 1851 | 3,600 00 |
| To Huntersville and Warm Springs, act 20th March, 1832 | 5,859 24 |
| To Ice's Ferry road, act 30th March, 1837 | 1,358 00 |

| | |
|---|---|
| To Jacksonville and Christiansburg, acts 21st March and 11th March, 1853 | 15,160 00 |
| To Jonesville and Little Stone Gap, acts 1st March, 1853, and 17th March, 1851 | 7,200 00 |
| To Jordan's Furnace and Rockbridge, act 7th March, 1848 | 3,600 00 |
| To Leesburg, act 19th March, 1850. | 8,450 00 |
| To Leesburg and Snickey Gap, act 16th March, 1847 | 1,990 65 |
| To Leed's Manor, act 31st March, 1848 | 2,000 00 |
| To Loudoun and Berlin, act 22d March, 1850 | 17,162 48 |
| To Luray and Front Royal, acts 31st March, 1851, and 14th February, 1853 | 35,487 00 |
| To Lynchburg and Buffalo Springs, act 4th March, 1839 | 9,171 00 |
| To Martinsburg and Winchester, act 24th March, 1848 | 27,000 00 |
| To Mechanicsburg and Wythe, act 12th March, 1853 | 6,375 00 |
| To Middlebrook and Brownsburg, acts 17th March, 1851, and 29th March, 1853 | 12,000 00 |
| To Milwood and Berryville, act 21st March, 1851 | 9,000 00 |
| To Mt. Jackson and Howard's Lick, act 9th March, 1860 | 5,250 00 |
| To Natural Bridge, act 28th February, 1837 | 6,100 00 |
| To Newark, act 28th March, 1851 | 3,000 00 |
| To New Market and Sperryville, acts 6th March, 1843, and 19th March, 1849 | 68,475 00 |
| To New Manchester, act 4th April, 1848 | 2,000 00 |
| To North Frederick, acts 4th March, 1850, 15th March, 1851, and 25th February, 1853 | 11,325 00 |
| To North River, act 12th February, 1851 | 5,400 00 |

| | |
|---|---|
| To Pittsylvania, Franklin, and Botetourt | 10,250 00 |
| To Pulaski and Giles, act 28th March, 1853 | 7,687 50 |
| To Reedy and Harrisville, acts 24th March, 1851, and 26th February, 1853 | 1,751 87 |
| To Raleigh and Grayson, act 28th February, 1854 | 38,400 00 |
| To Rocky Mount, acts 18th March, 1847, and 19th February, 1848 | 23,431 65 |
| To Rockingham, acts 18th March, 1850, 17th March, 1851, and 28th February, 1853 | 90,000 00 |
| To Russell and Washington, act 6th March, 1848 | 7,304 23 |
| To Russell, Old Courthouse, and Abingdon, acts 1st April, 1848, and 9th February, 1853 | 190 50 |
| To Salem and Pepper's Ferry, act 25th March, 1839 | 6,000 00 |
| To St. Mary's, act 24th March, 1851 | 6,000 00 |
| To Staunton and James River, act 1st March, 1847 | 31,000 00 |
| To Sperryville and Rappahannock, act 27th March, 1848, and 19th February, 1851 | 45,635 66 |
| To Smyth Courthouse and Plaster Banks, act 9th February, 1850 | 1,500 00 |
| To Salem Station and Rappahannock, act 27th February, 1854 | 5,336 47 |
| To Strasburg and Capon, act 27th March, 1860 | 3,000 00 |
| To Tazewell Courthouse and Fancy Gap, acts 8th March, 1851, and 11th March, 1853 | 42,918 17 |
| To Thornton's Gap, act 19th January, 1848 | 35,999 97 |
| To Tazewell Courthouse and Saltville, act 10th March, 1851 | 16,000 00 |
| To Valley, acts 24th March, 1838, 19th February, 1839, 12th February, 1841, 31st January, 1848 | 263,081 13 |
| To Walnut Gap road, act 15th February, 1854 | 1,305 37 |

| | |
|---|---|
| To Warrenton and Rappahannock, act 16th March, 1849 | 12,000 00 |
| To Warm Springs and Harrisonburg, act 26th March, 1853 | 15,000 00 |
| To Winchester and Berry's Ferry, act 21st January, 1848, and 31st January, 1850 | 14,962 50 |
| To Wytheville and Grayson, act 21st March, 1853 | 12,000 00 |
| To Wythe, act 12th March, 1853 | 600 00 |

BRIDGE COMPANIES.

| | |
|---|---|
| To Botetourt, act 11th March, 1850 | 3,600 00 |
| To Loudon and Berlin, act 16th February, 1854 | 28,563 00 |

STATE ROADS.

| | |
|---|---|
| To Alleghany and Huntersville road, acts 13th March, 1849, 1st July, 1850, 31st March, 1851, and 22d March, 1853 | 11,462 67 |
| To Price's turnpike and Cumberland Gap road, acts 5th March, 1834, 2d April, 1839, and 8th March, 1842 | 72,969 47 |
| To Staunton and Parkersburg road, acts 16th March, 1838, 19th February, 1845, 12th March, 1849, 1st March, 1853, 13th March, 1848, 5th March, 1846, 2d February, 1848, and 7th February, 1850 | 355,864 30 |
| To Southwestern turnpike road ($150,000 paid directly from treasury), acts 28th January, 1846, 12th January, 1847, 17th January, 1848, 24th January, 1848, 19th March, 1850, and 25th March, 1848 | 417,253 31 |
| To Fancy Gap road, act 17th January, 1853 | 1,976 20 |
| To Floyd Courthouse and Hillsville road, acts 25th February, 1850, 2d March, 1853, 9th March, 1853, 8th March, 1851, 7th March, 1856, 20th March, 1860, and 9th March, 1853 | 38,927 74 |

| | | |
|---|---|---|
| To North Carolina and Wytheville road, act 17th January, 1848..... | 1,976 20 | |
| To Tazewell Courthouse and Richland road, acts 30th January, 1850, and 16th February, 1853..... | 11,879 47 | |

RECAPITULATION.

| | | |
|---|---|---|
| To railroads and canals..... | 31,077,371 45 | |
| To plank roads..... | 453,561 45 | |
| To turnpike companies..... | 3,853,440 46 | |
| To bridge companies..... | 32,163 00 | |
| To State roads..... | 912,109 36 | |
| | | 36,328,645 72 |
| Deduct parts improvements not in the State : | | |
| To Winchester and Potomac railroad | 40,000 00 | |
| To Chesapeake and Ohio railroad... | 1,600,000 00 | |
| To Martinsburg and Winchester.... | 13,500 00 | |
| To Raleigh and Grayson..... | 19,200 00 | |
| To Hardy and Winchester..... | 14,100 00 | |
| To Huntersville and Warm Springs. | 2,800 00 | |
| To Jacksonsville and Christiansburg. | 7,500 00 | |
| To Strasburg and Capon..... | 1,500 00 | |
| To Staunton and Parkersburg..... | 266,898 00 | |
| | | 2,005,498 00 |
| Total amount expended within this State..... | | $34,323,147 72 |

This debt, therefore, was created in raising money which was expended, as above set forth, in works of internal improvement within the present limits of the commonwealth.

These works consisted of railroads, canals, plank roads, turnpikes, and road and river improvements. Much the largest portion of them remain to this day to administer to the comfort and convenience of of the people who borrowed the money to assist in their construction. Fourteen hundred and fifty miles of completed and operated railroad now exist, which were constructed by the assistance of, and largely on the credit of the commonwealth. According to the report of the commissioner of railroads, these works represent an aggregate cost of $80,000,000.

Of this sum the commonwealth contributed $18,454,079.29; private subscriptions to stock by the citizens of the commonwealth, $12,300,000; and the remaining $49,250,000 was contributed by foreign capital and raised by negotiating the bonds of the commonwealth to the amount of $3,650,000 and those of the companies for the balance.

This enormous sum of eighty millions has not been returned to the original investors; for, with only one single exception, every railroad company has proved unprofitable to its projectors and owners, and has been, or is now, in the process of being reorganized. But the $80,000,000 thus expended in railroads has not been lost; it has been transfused into the lands lying contiguous to their lines, and imparted more than that much of additional value to them.

While the railroad investments in Virginia have been disastrous to the original projectors and investors, they have been of quite double the value of their cost to the property, agricultural and city, to which the works constructed by them minister. It is clear, then, that the commonwealth, by investing the amount she has in these works, has secured their completion and induced the expenditure of nearly fifty millions of foreign capital within her limits, has acted wisely, although she may have failed to realize any direct returns from her outlay. She has increased the aggregate wealth of the community at least six times the amount she has expended; and it is a *moderate* statement that the destruction and removal of the two east and west lines of road, and the two north and south lines through Virginia, would at once strike one hundred and fifty millions from the value of the property of her people. Therefore, it is clear that the people residing within the present limits of the commonwealth have received value four or five fold of the public debt created for these improvements.

### THE PLEDGES BY VIRGINIA TO PAY HER PUBLIC DEBT.

Prior to 1838, Virginia had contracted a debt amounting to $3,265,200. At that date she had determined to embark fully in her system of internal improvements, and by her legislation of that year made complete provision for supplying the funds to carry them on by the pledge of her public credit.

By her act of 1838 (chapter 12, page 24), she laid down the manner in which all loans thereafter negotiated for her should be placed on the market, and the proceeds thereof realized and applied. And by section 3 of said act she declared :

"For the payment of the interest and the final redemption of the principal of any money so borrowed, the stock of any company subscribed for or purchased with the said money, and the net income which may accrue therefrom, is appropriated and pledged ; and the net income from any works (other than that of joint stock companies) on which the money borrowed is expended is, in like manner, appropriated and pledged for the payment of the interest and redemption of the principal of such money; and, *if such stock and increase shall be inadequate to the payment of the interest and the final redemption of the principal*, THE GENERAL ASSEMBLY PLEDGES THE FAITH OF THE

STATE TO PROVIDE SUFFICIENT FUNDS, AND FOR THAT PURPOSE TO LEVY ADEQUATE TAXES."

Under this pledge (made by the general assembly of Virginia) of the faith of the state to provide adequate funds, and for that purpose to levy adequate taxes, all the public debt was created and all the money procured, save and except the sum of $3,265,200 borrowed before that time. Much the greater part of this latter sum was paid off or satisfied prior to 1865.

After the dissolution of the Confederacy, the government of Virginia was restored under the Alexandria constitution in May, 1865. The general assembly which then met ordered an election through the state to fill the vacant seats in that body, and the legislature elected under that order met in December of that year. It was elected by the whole body of the qualified *white* voters of the state. It represented Virginia and Virginia sentiment, and was the last representative body of Old Virginia that ever met.

The House elected John B. Baldwin speaker. It consisted of such representative Virginians as Baldwin, of Augusta; W. M. Cabell, of Nelson; Peachy R. Grattan, of the City of Richmond; Charles Herndon, of Spotsylvania; William T. Joynes, of Petersburg; James Marshall, of Frederick; W. L. Owen, of Halifax; Z. Turner, of Rappahannock; F. N. Watkins, of Prince Edward, and others like them—the last body of the Old Virginia men who were ever to represent the ancient commonwealth.

On the day of their meeting, the governor sent in his message, showing that the amount of the entire debt up to July 1st, 1865, was $34,966,398.38, and interest in arrears up to that date, $6,091,918.49, making total debt $41,658,316.87.

The finance committee consisted, in the House, of Grattan, Owen, Gibboney, Stearns, Robertson, Martin, Atkinson, Z. Turner, Waddell, Magill, Gray, Harnsberger and Hardy. In the Senate it was composed of Lemosy, Hannah, Keen, Robinson, Carter, Bolling, Crockett, Gray and Galt. It at once addressed itself to the subject of the public debt.

On December 21, on motion of Mr. Robertson, it was

"Resolved, That the committee on finance enquire into the expediency of funding the interest debt of the state, aud report by bill or otherwise."

On February 20, 1866, the committee on finance reported "a bill to provide for funding the interest on the public debt," which bill passed *unanimously* on March 2—78 ayes; nays, none,* Baldwin,

* YEAS—Messrs. Baldwin, Atkinson, Baylor, Bekem, Bentley, Booker, Bowles, Braxton, Browning, Cabell, A. J. Clark, W. T. Clark, Daniel, Davis, Davidson, Deskins, Dickenson, Dunnington, Evans, Fields, Garnett, Garrett, Glendy, Grat-

Joynes, Grattan, Stearns, and the rest recording their votes in the affirmative. This bill passed the Senate on the same day, under a suspension of the rules, also unanimously—22 ayes; noes, none.* This act (1865–66, chapter 9, page 79) is entitled an act to provide for funding the interest on the public debt. It provides that the holders of any bonds of the state issued prior to April 17, 1861, may *invest* the interest due on said bonds in bonds of the state bearing the same rate of interest as the principal of the bonds bear; and section 5 further provides that the holders of bonds issued by the restored government of Virginia since the creation of the state of West Virginia, are also hereby authorized to invest the interest now due thereon in bonds of the state, as provided for other bondholders.

This Virginia legislature, therefore, assumed not only the whole debt of Old Virginia, and the war interest thereon, but also such debt as may have been created by the restored state of Virginia. It was the voluntary act of Virginia's representatives acting for Virginia.

This funding of the public debt proceeded during the year 1866. The general assembly treated the interest due and unpaid as a debt, and authorized it to be *invested* in new bonds of the state.

It is settled law in Virginia that interest overdue and unpaid is a good consideration for a new contract, in which interest shall be paid. Pindall's Ex'r *vs.* The Bank of Marietta, 10 Leigh, 484, decided in 1839.

Before the session of 1866–67 began, however, there were some changes in the representative body. Hon. W. W. Crump took the place of Peachy R. Grattan, Esq., in the House, and Hon. Robert Ould, John H. Gilmer, Esq., in the Senate, from the city of Richmond, and in the House, Judge Crump was made chairman of the committee on finance. That committee in due time reported a bill for paying the interest on the state debt, which passed the House March 20, 1867, by

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tan, Graves, Hansbrough, Hardy, Herndon, Holmes, Jackson, Jones, Joynes, Kendrick, Kilby, Lee, Lewis, Long, Mason, Marshall, Martin, Magill, Merritt, Miller, Moore, Morris, Mosby, Newberry, Owen, Pate, Patterson, Peed, Pendleton, Powell, Purdy, Riggs, Rixey, Robertson, Scott, Seawell, Smith, Stearns, Straughan, Strayer, J. McDowell Taylor, W. F. B. Taylor, Tucker, Thompson, Townes, Trout, Z. Turner, Waddell, Wall, Watkins, White, Wilson, Woltz, Wooldridge and Word—78.

NAYS—None.

*House Journal*, 1865-66, *page* 448.

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* AYES—Messrs. Alexander, Belew, Cabell, Carter, Crockett, Davis, Galt, Gilmer, Gray, Keen, Lawson, Lee, McRae, Mitchell, Peck, Powell, Power, Richmond, Robinson, Strother, Trout and Washington—22.

NOES—None.

*Senate Journal*, 1865-66, *page* 312.

ayes 58, noes 18; the ayes including Baldwin, Crump, Herndon, Marshall and others.†

It was communicated to the Senate the same day by Judge Crump, and passed under the suspension of the rules, after striking out a section by ayes 17; noes 2.‡

This section provided that all bonds and stocks held by the State in internal improvement companies might be exchanged for bonds of the State, and the amendment was agreed to by the House on the next day, March 21, by ayes 58; noes 18. The act, as passed, appears in the acts of 1866–67 as chapter 35, "an act to provide for the payment of *a part of the interest* upon the public debt." It declares:

"Whereas, from the immense loss of property sustained by this state in the late war, it is found impossible, under present circumstances, to pay *full interest* on the public debt; and whereas, it is the desire and purpose of the general assembly to make provision for paying the same as fully as the resources of the state will warrant;" therefore it was enacted: "That two per cent. interest be paid on January 1 and July 1, 1867, on the principal of the debt, excluding the bonds given for interest in 1866, *that being the interest which this state feels obliged to pay*, until there is a settlement of accounts between this state and West Virginia."

Four per cent. interest on the whole debt is six per cent. on two-thirds of the debt; and by this act Virginia declared that she felt herself *obliged to pay* this interest. She therefore passed it. On April 11, 1867, the Senate passed a bill authorizing the issue of certificates in the nature of coupons, in anticipation of the semi-annual interest on the registered bonds, and authorizing the use of the same, and of

† YEAS—Messrs. Baldwin, Atkinson, Bekem, Booker, A. J. Clark, Crump, Daniel, Davison, Davidson, Deskins, Dickenson, English, Evans, Fields, Garrett, Glendy, Goode, Graves, Gray, Hancock, Hansbrough, Harnsberger, Herndon, Jackson, Jones, Kelly, Kellam, Kendrick, Kilby, Lee, Leonard, Lewis, Long, Mann, Marshall, Magill, McGruder, Merritt, Miller, Morgan, Morris, Owen, Peed, Pendleton, Purdy, Riggs, Robertson, Scott, Strayer, Tucker, Thompson, Townes, Trout, Waddell, Wall, Watkins, White and Wilson—59.

NAYS—Bowles, Cabell, Dunnington, Garnett, Graham, Harris, Martin, Patterson, Powell, Ragsdale, Rixey, Seawell, Straughan, W. F. B. Taylor, Z. Turner, Woodson, Word and Wyatt—18.

*House Journal*, 1866–67, *page* 61, *Extra Session*.

‡ AYES—Messrs. Alexander, Bolling, Crockett, Davis, Dulaney, Gray, Hannah, Kello, Lee, McRae, Miller, Mitchell, Ould, Power, Richmond, Robinson and Taliaferro—17.

NOES—Messrs. Cabell and Coleman—2.

*Senate Journal*, 1866–67, *page* 377.

coupons of interest, *in payment of public dues*, by ayes 17 ; noes 2,* and the House passed it April 24 by ayes 63 ; noes 3.† This act declared that the second auditor should issue to bondholders certificates of interest, which interest was payable by the act above mentioned, six months before such interest should fall due, and that such certificates of interest, and also coupons of interest, for payment of which provision has been made, *shall be received in payment of state taxes and other public dues.*—Acts 1866–67, chapter 103, page 904.

Directly after the beginning of the session, on December 11th, however, Mr. Evans, of the city of Richmond, introduced into the House joint resolutions on the subject of *repudiation*, and they were passed, December 18th, *without a division.* The Senate passed them the next day—ayes 23 ; noes 1. They are (chapter 33, Acts 1866–67, page 499 :)

"Whereas, the public credit of the state of Virginia and the credit of our citizens has been injured, and is now being injured, by the apprehension that this general assembly will repudiate the debt of the State, and authorize the repudiation of the debts of her citizens ; and whereas we deem it important to remove this apprehension from the minds of all persons, and so to remove it at once ; and whereas, if the disposition existed on the part of the general assembly to pass any repudiating act, the constitutions of both the state and Federal government positively prohibit the passage of any such law ; and in order to prevent any further injury to our credit ; therefore,

"1. Resolved, That this general assembly will pass no such acts of repudiation.

"2. That such legislation would be no less destructive of our future prosperity than of our credit, our integrity and our honor."

Such is the record of this Virginia legislature—the last representa-

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* AYES—Messrs. Alexander, Bolling, Cabell, Crockett, Dulaney, Gray, Hannah, Kello, Lawson, McRae, Meade, Miller, Mitchell, Peck, Richmond, Robinson and Taliaferro—17.

NOES—Messrs. Coleman and Saunders—2.

*Senate Journal*, 1866–67, *page* 381.

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† YEAS—Messrs. Baldwin, Atkinson, Bekem, Booker, Bowles, Braxton, Browning, Butt, Cabell, A. T. Clark, Childress, Crump, Dickinson, Dunnington, English, Fields, Graves, Gray, Hansbrough, Harnsberger, Herndon, Holmes, Jones, Kelley, Kellam, Kendrick, Kilby, Leonard, Lewis, Long, Mann, Marshall, McDonald, Merritt, Miller, Moore, Morgan, Owen, Peed, Pendleton, Powell, Purdie, Ragsdale, Scott, Seawell, Smith, Straughan, J. McDowell Taylor, W. F. B. Taylor, Teeter, Thompson, Townes, Trout, W. A. Turner, Waddell, Wall, Watkins, White, Wilson, Woltz, Wooldridge, Word and Wyatt—63.

NAYS—Messrs. Graham, Mosby and Rixey—3.

*House Journal*, 1866–67, *page* 125, *Extra Session.*

tive body of the society of the commonwealth as it had existed up to 1861. It assumed the payment of the whole debt of $41,058,316 87. It included in that the war interest, no matter to whom due or by whom her obligation had been held, and added to it such debt as had been created by the "restored" state of Virginia.

It provided for payment of six per cent. interest on two-thirds of that debt, and declared that Virginia felt herself obliged to pay that much. It created, issued, and put in circulation coupons receivable for taxes, and denounced repudiation as destructive alike "of our future prosperity, our credit, our integrity and our honor."

This general assembly, composed of the wisest and best Virginians that had represented the people for a generation, only performed their duty in the light of their legal, moral and honorable obligations.

In the case of the Commonwealth vs. Higginbotham (25 Grattan, 627), the Supreme Court of Appeals of Virginia has since declared that "the present state of Virginia is bound to the creditors of the state for debts due before the division of the state for the whole of their debts, and West Virginia is equally bound for them."

It is equally clear that the state was, and is, bound to pay all interest, no matter to whom due, or whether falling due during war or not.

The American Courts have settled it as law, that interest on debts between the citizens of opposite belligerents is stopped by a state of war. But this is because during war citizens of countries at war with each other can have no lawful communication with each other, unless by leave of their sovereign; neither can pay money, nor can either receive money from the other. Therefore, because a power superior to their own will intervenes and prevents the payment or receipt of the debt, the courts hold that no interest can be charged during the period while such disability lasts.

But these reasons do not apply to a sovereign state. It makes its own wars, and it makes peace. It can communicate with or pay money to whom it pleases. It cannot by going to war, which is its own free act, avoid its obligations or release itself from its duty to pay its creditors.

"It would not be easy to find an instance," says Wheaton, "where a prince had thought fit to make reprisals upon a debt due by himself to private men. There is a confidence that this will not be done. A private man lends money to princes upon engagements of honor, because a prince cannot be compelled like other men by a court of justice. So scrupulously did England and France adhere to this public faith, that even during the war (terminated by the peace of Aix-la-Chapelle) they suffered no enquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain

that many English had money in the French funds, and many French had funds in the English." Wheaton's International Law, 345.

During the Crimean war, the interest on Englsh consols was regularly paid to Russian holders; and Russia paid the interest on her bonds in gold in London, according to her promise, during the same war; and during the Franco-Prussian war the French rentes were paid, as agreed, to German owners; and the United States, during the civil war, which was prosecuted with the unwonted rigor of sequestration, and confiscation of private debts, never enquired whether the interest paid on her debt was paid to the "loyal" citizen, the "rebel," or the foreigner.

The idea that war releases a State from payment of interest on her debt, involves the principle that a State can release herself from her own obligation, for she can always make war at her own will.

Having thus reviewed the conduct of Virginia in the creation of the debt, and her management of it after war and division, it only remains to examine what are the relations of the new body politic called into existence by the constitution of 1869 to it. The white people of Virginia, by their act of 1838, pledged the faith of the state to levy taxes to pay the debt; and in 1866-67 again declared that they felt obliged to assume the whole, and to pay six per cent. interest on two-thirds, pending the settlement with West Virginia. But under the reconstruction laws and amendments to the Federal constitution, the whole people of Virginia were made citizens, and the obligations of citizenship imposed on them. To be sure, a portion of our people were disfranchised, but they had been represented in the general assembly of 1865-66-67.

Accordingly, a constitution was framed and submitted for adoption or rejection, to a vote of the whole people of Virginia—white and black—on the 6th of July, 1869. At this election there were cast 125,114 votes by white voters, and 97,205 by blacks. Of them, 210,585 votes were cast for the constitution and 9,136 against it. The organic law was ordained by a plebiscite, so powerful and so nearly unanimous that it has no parallel in American experience. The tenth article of that instrument fully and explicitly recognizes the liability of Virginia for the whole of the debt.

Therefore, if any solemn form of assent can bind a people—if there is any method by which such assent can be certified and made known to the world—Virginia is bound for the forty-one millions due July 1, 1865, and the interest thereafter due on the same.

Such was the condition of the facts and the state of the law when the act of 1871, commonly known as the funding act, was passed. Her debt up to July 1, 1871, the date from which that law was to operate, as ascertained by the official statement published in the acts of 1871-72 (page 515), was $47,090,806 43.

That act set out that "whereas the people of this commonwealth are anxious for the prompt liquidation of her portion of said debt, which is estimated to be two-thirds of the same; and whereas it has been suggested that the authorities of West Virginia may prefer to pay that State's portion of said debt to the holders thereof, and not to this State, as the constitution of this state provides." Therefore, to enable West Virginia to settle her portion, and for the purpose of promptly restoring the credit of Virginia by providing for the prompt and certain payment of the interest upon her proportion of said debt, as the same shall become due—therefore, Virginia proposed to the common creditors :

1. That they should surrender their old bonds to her.

2. That they thould receive from her, in exchange for these, bonds for two-thirds of the debt, and interest due on them, payable in thirty-four years from July 1, 1871, and the interest coupons on them should be receivable after maturity in payment of all taxes and public dues.

3. That they should at the same time receive certficates for the other third, setting forth that payment of said third, with interest thereon at the rate prescribed in the bond surrendered, will be provided for in accordance with such settlement as shall hereafter be had between the States of Virginia and West Virginia in regard to the public debt, and that Virginia holds said bonds, so far as unfounded, in trust for the holder or his assignees.

Virginia, by that act, said : "I am bound to you for your whole bond, but in justice and equity I ought only to pay two-thirds. I therefore propose that you take my new note for that two-thirds, and I will settle hereafter for the other third, in accordance with such settlement as I may have with West Virginia."

This proposition was accepted by over two-thirds of the creditors, and it is believed would have been accepted by all but for the reason that the next legislature withdrew it, and refused to allow any more of the creditors to come in under it. The advantages accruing to Virginia by its acceptance, are a reduction of the debt which she so often and so solemnly promised and undertook to pay by one-third and an extension of the time of payment.

The creditor got no advantage of the state by the arrangement. He gave up an absolute claim for one-third, and received in return the right to have his coupons received for taxes. But his old debt rested on the security of the pledge of the public faith of Virginia. His new security rests at last only on the same basis. The public faith, by the funding bill, was pledged that his coupons should be received for taxes. When that is broken and repudiated, his right is substantially impaired. The courts, it is true, will enforce his rights, and whenever an appeal is made to them will compel the state officers to receive the coupons according to contract. But a right that can

only be enforced by a constant and incessant appeal to judicial proceedings is so substantially impaired as to be a never-ceasing and irritating wrong when the pledge of public faith, the main and substantial security for the performance of the promise, is broken. The courts will, in time, be inefficient to afford any full and proper address; and in this connection it is proper to say that it matters not whether the funding bill constituted a contract which the general assembly of Virginia had the constitutional power to make or not; they undoubtedly had both the right and the power to make the promise. By that promise they induced the creditors to change their position, and to give up their old security for one hundred cents, and to recive in lieu thereof a new one for only sixty-six cents; and neither the general assembly nor the whole people of Virginia have now the right—the right in morals, the right in conscience, equity and honor—to withdraw their promise by which they have induced their creditors to surrender rights they before were entitled to.

The fact that the people of a state are only restrained from breaking their plighted faith by the courts, by the constitution of the United States, is as injurious to their moral sense and to their reputation as their actual repudiation of it. A people who only do right because they are afraid of the legal consequences of doing wrong, are resting their whole social order on the shallow foundation of a temporary, contracted and short-sighted expediency.

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## APPENDIX B.

(H. B. 92. P. H. McCaull, Chairman House Committee; A. Koiner, Chairman Senate Committee. February 25, 1878.)

### "THE BARBOUR BILL."

AN ACT imposing taxes on real and personal property, to meet the necessary expenses of the Government, for public free-schools purposes, and to pay the interest on the public debt.

WHEREAS, the condition of the people of this Commonwealth is such as to render an increase of the rate of taxation upon property impracticable, and the general assembly of Virginia conceding that its power to tax the property or person of the citizen must at all times be confined within the reasonable limits prescribed by what, in the

judgment of the general assembly, is the ability of a citizen to pay without ruinous damage to his property and business, hereby declared that the present rate of taxation, to wit: fifty cents on every hundred dollars of the assessed value of property, is the utmost limit to which this general assembly should proceed in levying taxes; and whereas, the revenues of the Commonwealth, with the present rate of taxation (which is the highest that should be imposed at this time), will not enable the Commonwealth to maintain its governmental organization by paying the necessary expenses incident thereto under the most rigid system of economy; and to discharge its constitutional obligation to the system of free schools, ordained by the fundamental law of this Commonwealth, and to pay the present rate of interest on the amount claimed as the principal of the public debt; and whereas, the preservation of the State Government is absolutely necessary, not only for the protection of the person and property of the citizen of the Commonwealth, but for the preservation of the rights and promotion of the interest of the creditor of the Commonwealth; therefore,

1. Be it enacted by the general assembly, That small tracts and lots of land, and the improvements thereon not exempt from taxation, and on all personal property and choses in action, and on all toll-bridges and ferries there shall be a tax—levied in each year until otherwise provided by law, First, of twenty-five cents on every one hundred dollars of the assessed value thereof, which shall be paid and collected only in lawful money of the United States for the exclusive purpose of defraying the necessary expenses of maintaining the government of this Commonwealth, as the said disbursement may be directed by proper appropriation acts of the general assembly: Second, of ten cents on every one hundred dollars of the assessed value thereof for public free-school purposes, which shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the public free-school fund, and shall be used for no other purpose whatever: Third, of fifteen cents on every one hundred dollars of the assessed value thereof, which, with all other revenue except the capitation tax and a portion of the liquor-license tax, not to exceed seventy-five thousand dollars, shall be applied to the payment of the interest on the public debt.

2. It shall be the duty of the auditor of public accounts to have prepared as soon as practicable the necessary books for the commissioners of the revenue, with sufficient and appropriate columns for designating and setting apart the several taxes hereby levied for the objects and purposes herein recited.

3. It shall be the duty of the treasurers or other collecting officers

of the counties, cities and corporations of the Commonwealth, as soon as the commissioners of the revenue shall deliver their books of assessment, to have made out tax bills, in which shall be specified the amount of tax levied for each of the purposes above named, and shall keep the same separate and distinct from each other upon the books of their offices. The said treasurers or other collecting officers shall, as soon as said books are delivered to them, and the said tax-bills made out, proceed to collect the same as now required by law, and pay into the treasury the amounts so collected by them; which amounts shall be placed to the credit of accounts, which shall be kept by the treasurer and denominated, first, the account of money paid in and disbursed for the purpose of defraying the expense of maintaining the government of the Commonwealth: second, the account of money paid in and disbursed for public free-school purposes: third, the account of money paid in and disbursed for paying the interest on the public debt; and the funds so credited to these several accounts shall be disbursed for the several purposes designated for the said accounts in such manner as may be prescribed by law.

4. The collectors of the public revenue shall in every respect conform to the requirements of section three of this act in collecting and remitting said revenue, and, upon a failure thereof, shall be proceeded against in the same mode as is directed against the treasurers or other collecting officers of the counties or corporations by existing laws.

5. Nothing in this act shall be construed as compelling the creditors of the State to compromise their legal rights; it being the intention of the General Assembly, by the provisions of this act, to relieve the present financial embarrassments of the State, with a purpose to secure an adjustment of the public debt, with the consent of the creditors if practicable, and without discriminating between them, upon fair and equitable principles.

6. This act shall be in force from its passage.

(Signed) HENRY C. ALLEN,
*Speaker H. D.*

(Signed) WM. D. QUESENBERRY,
*President pro tem. of the Senate.*

H. B. 92.

This bill is not approved, and my reasons therefor sent, February 27, 1878, to the House of Delegates, in which it originated.

(Signed) FRED. W. M. HOLLIDAY.

OFFICE KEEPER OF THE ROLLS OF VIRGINIA.

I hereby certify that the foregoing is a true copy from the rolls in my office, this tenth day of June, eighteen hundred and eighty-two.

(Teste) P. H. McCAULL,

*Clerk House of Delegates and Keeper of the Rolls of Va.*

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## APPENDIX C.

### "THE RIDDLEBERGER BILL."

AN ACT to re-establish the public credit. Vetoed.

Whereas, the people of Virginia have renounced the basis and principles of the proposed settlement of the public debt, which are comprehended in the Act of Assembly approved March twenty-eighth, eighteen hundred and seventy-nine ; and

Whereas, it is confidently believed that the people of this State will never acquiesce in any settlement which shall obligate them and their posterity to pay any part of the interest upon the public debt which accrued during the war and the period of reconstruction ; and

Whereas, the principal of the debt recognized by the Act approved March twenty-eighth, eighteen hundred and seventy-one, computed to the first of July following, and taken as the debt of the State before the creation of West Virginia at forty-five million seven hundred and eighteen thousand one hundred and twelve dollars and twenty-three cents, embraced fifteen million twenty-five thousand six hundred and four dollars of capitalized interest, which had accrued during the period of war and reconstruction ; and

Whereas, every consideration of equity and the circumstances of war, the immense loss of property by the people of Virginia aggregating fully five hundred millions of values, and the shrinkage in assessed values from seven hundred and twenty-three millions to three hundred and thirty-six millions, reducing the revenue from over four millions to two and a half millions, further justify the elimination of such capitalized interest from any computation of the debt ; and

Whereas, the amount of such capitalized interest constitutes, as near as may be, one-third of said indebtedness so computed to July first, eighteen hundred and seventy-one ; and

Whereas, legislation assigning two-thirds of said indebtedness to Virginia and one-third to West Virginia has been generally acquiesced in, and the principal of the indebtedness thus wrongfully apportioned to Virginia under the computation of act approved March thirtieth, eighteen hundred and seventy-one, is as of January first, eighteen hundred and eighty, thirty-one million one hundred and two thousand five hundred and seventy-two dollars, whereof twenty-two million nine hundred and nine thousand four hundred and forty-seven dollars is evidenced by bonds or other obligations issued under the acts of March thirtieth, eighteen hundred and seventy-one, and March twenty-eighth, eighteen hundred and seventy-nine, and hereafter denominated as class A, and the remainder by bonds or other evidence of debt, designated as class two by the act approved March twenty-eighth, eighteen hundred and seventy-nine, aggregating, as of January first, eighteen hundred and eighty, the sum of eight million one hundred and ninety-three thousand one hundred and twenty-four dollars; and

Whereas, the holders of said obligations of class A (except as to two million five hundred thousand dollars of class two, funded under the act of March twenty-eighth, eighteen hundred and seventy-nine), have for nine years, including July first, eighteen hundred and eighty, received interest nominally at six per centum upon principal, one-third too large, by the wrongful capitalization of interest, as aforesaid, which, reckoned at four and a half per centum, amounts to over three million dollars, and ought not, in equity, to have been paid, therefore, the principal of said indebtedness, as it now stands, amounting to twenty-two million nine hundred and nine thousand four hundred and forty-seven dollars, ought to be reduced by the amount of interest so wrongfully capitalized, and the interest upon interest thus wrongfully paid to the holders of such bonds; and therefore the principal of this class of the State indebtedness should in equity be reduced to twelve million one hundred and forty-two thousand and six dollars, or at the rate of fifty-three dollars for every one hundred dollars of the face of such indebtedness as is now outstanding; and

Whereas, the principal of that part of the debt known as class two in the act of March twenty-eighth, eighteen hundred and seventy-nine, amounting, as of January first; eighteen hundred and eighty, to eight million one hundred and ninety-three thousand, one hundred and twenty-four dollars, is one third too large by the wrongful capitalization of interest, as aforezaid, the same should be reduced to five million four hundred and sixty-two thousand and eighty-three dollars, or at the rate of sixty-six dollars and sixty-six and two-thirds cents for every one hundred dollars of the face of said indebtedness as is now outstanding; and

Whereas, interest for nine years to the first of July, eighteen

hundred and eighty, has been allowed upon the principal of the debt embraced in class two, aforesaid, which principal is too large by one-third of the amount thereof because of the capitalization of interest, as aforesaid, and there is now past due and unpaid of such interest three million four hundred and thirty-five thousand one hundred and forty-five dollars; therefore it is equitable that the same should be reduced by the sum of one million four hundred and seventy-four thousand seven hundred and sixty-two dollars (that being interest upon the one-third of principal so wrongfully capitalized), or funded in the bonds authorized to be issued under this act at the rate of sixty dollars for every one hundred dollars of such past due and unpaid interest aforesaid; and

Whereas, the equitable adjustment of the public debt of the State, as determined by the application of the fact and principles aforesaid, fixes the aggregate thereof at nineteen million six hundred and sixty-five thousand one hundred and seventy-six dollars; and

Whereas, there is now outstanding seven hundred and eighty-three thousand two hundred and forty-one dollars and fifty cents of past due tax receivable coupons, and balances due to the schools, asylums, and on other accounts, amounting to some one million eight hundred thousand dollars, for the payment of which it is of paramount importance that provision be made in the apportionment of the current net revenues of the State; and

Whereas, the net revenues of the State cannot be safely relied on for more than two million one hundred and sixty-five thousand dollars, after the reassessment required to be made in eighteen hundred and eighty, owing to the reduction in taxable values, estimated to be consequent thereupon, and certain necessary reforms in the system of assessment of property and licenses; and

Whereas, the existing rate of taxation is recognized to be the highest that can be endured under the circumstances of the long distress and heavy burdens of this people, and the search for new subjects of taxation has been exhausted; and

Whereas, the necessary expenses of conducting the government after adopting and applying every practicable measure of reform and economy cannot safely be estimated below the sum of nine hundred thousand dollars, and the proportion of such estimated revenue due to the public schools will be four hundred and thirty-one thousand seven hundred dollars; the balance remaining for the liquidation of the floating debts aforesaid and for the payment of interest upon the bonds created by this act cannot exceed the sum of eight hundred and thirty-three thousand three hundred dollars; and

Whereas, the means of prompt and regular payment should be apparent, and the people's approbation of this settlement should be

expressed at the polls, in order to give assurance of the good faith and permanence thereof; therefore,

1. Be it enacted by the general assembly of Virginia, that the board of commissioners of the sinking fund of the State be and they are hereby empowered and directed to create bonds, registered and coupon, to such extent as may be necessary to comply with the provisions of this act.

2. The said bonds shall be dated July first, eighteen hundred and eighty, and be payable at the office of the treasurer of the State, on the first day of July, nineteen hundred and twenty; provided, that the State may, at any time and from time to time, after July first, eighteen hundred and ninety, redeem any part of the same, principal and interest, at par. In case of such redemption before maturity, the bonds to be paid shall be determined by lot, by said board of commissioners, and notice of the bonds so selected to be paid shall be given in a newspaper published at Richmond, New York and London, England, when interest from and after ninety days from the date of such publication in London shall cease upon the bonds so designated to be paid.

3. The form of the bond shall be as follows, to wit:

The commonwealth of Virginia acknowledges herself indebted to (in case of a coupon bond to bearer and in the case of a registered bond inserting the name of the person or corporation) in the sum of dollars, which she promises to pay in lawful money of the United States, at the office of the treasurer of the State, Richmond, Virginia, on the first day of January, nineteen hundred and twenty, with the option of payment at par, principal and interest, before maturity, at any time after July first, eighteen hundred and ninety; and interest at the office of the treasurer of the State, in such lawful money, on the first days of January and July, at the rate of three per centum per annum until paid (according to the tenor of the annexed coupons—in the case of coupon bonds). In testimony whereof, witness the signature of the treasurer, and the counter-signature of the second auditor, hereunto affixed according to law.

4. The form of coupon for coupon bonds shall be as follows, to wit: No. (of bond). The commonwealth of Virginia will pay to bearer dollars, in lawful money of the United States, at the office of the treasurer, Richmond, Virginia, on the first day of January and July, alternately, the first coupon to be payable January the first, eighteen hundred and eighty-one,

$ treasurer.

Each coupon to be impressed on the back with its number, in the order of maturity, from one forward.

5. The said board of commissioners are authorized to issue such

bonds, in denominations of one hundred, five hundred, and one thousand dollars, as may be necessary to carry out the provisions of this act, each denomination to be of differennt tint; provided, that registered bonds may be issued of any denomination, multiple of one hundred—all registered bonds to be of the same tint; and they are authorized to issue such bonds, registered or coupon, in exchange for the outstanding obligations of the State hereinbefore enumerated, including the bonds held by the literary fund, as follows, that is to say: (*a*) For the principal of all bonds, or other evidences of debt embraced in class A, at the rate of fifty-three per cent.; that is to say, fifty-three dollars of the bonds authorized under this act, principal and accrued interest from the preceding period of maturity to the date of exchange, at par, are to be given for every one hundred dollars face, principal and accrued interest from the preceding semi-annual period of maturity to the date of exchange, of such indebtedness; and for any interest which may be past due and unpaid upon such indebtedness funded, bonds issued under this act may be given, dollar for dollar.

(*b*) The principal of all bonds or other evidences of debt embraced in class one, at the rate of sixty-six and two-thirds per centum; that is to say, sixty-six dollars and sixty-six and two-thirds cents of the bonds authorized by this act (principal and accrued interest from the preceding period of maturity to the date of exchange, at par) are to be given for every one hundred dollars, face, of the principal of such indebtedness.

(*c*) For two-thirds of the interest past due and unpaid upon the unfunded debt, including the sterling bonds, since July the first, eighteen hundred and seventy-one, and for all other past due and unpaid interest upon other bonds and evidences of debt embraced in class two, to the date of exchange, at the rate of sixty per centum; that is to say, for every one hundred dollars of such interest so computed sixty dollars of the bonds issued under this act (principal and accrued interest from the preceding period of maturity to the date of exchange at par) are to be given.

6. For the one-third of the unfunded debt, including the sterling bonds, computed as of the first of July, eighteen hundred and seventy-one, the said board of sinking fund commissioners shall issue a certificate as follows:

*No.*

The Commonwealth of Virginia has this day discharged her accepted share of the (registered or coupon, as the case may be) bond for ..... dollars, held by ....., dated the ..... day of ....., and numbered ....., leaving a balance of ..... dollars, with interest from the first day of July, eighteen hundred and

seventy-one, to be accounted for by the State of West Virginia, without recourse upon this Commonwealth.

Done at the capital of the State of Virginia this ..... day of ....., eighteen .....

, *Second Auditor.*

, *Treasurer.*

7. The said board of commissioners are empowered to issue for any fractional part of one hundred dollars of the indebtedness funded under this act the following certificate:

FRACTIONAL CERTIFICATE.

*Register No.* *Transaction No.*

This certificate entitles the holder hereof to the sum of ..... dollars, fundable at its face in the bonds of the Commonwealth of Virginia, authorized by an act approved ..... day of ....., ....., eighteen hundred and eighty, when presented with certificates of like tenor, or in conjunction with other evidences of debt fundable under said act in amounts of one hundred dollars and multiples thereof.

Done at the capital of Virginia this ..... day of ....., eighteen hundred and eighty.

, *Second Auditor.*

, *Treasurer.*

The certificates so issued shall be registered by the Second Auditor in a register kept for that specific purpose, giving the date and number of the transaction to which it relates, the amount of the same, and the name of the person or corporation to whom it was issued; and as such certificates are refunded the same shall be cancelled and preserved as herein provided in respect to other obligations refunded.

8. All the bonds and certificates of debt and evidences of past due and unpaid interest taken in under the provisions of this act shall be cancelled by the treasurer in the presence of the board of commissioners of the sinking fund, as the same are acquired, and by the treasurer the same shall be carefully preserved until such time as the general assembly may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so cancelled, from time to time, shall be certified by said board and filed with the treasurer for preservation.

9. All the coupons and registered bonds and fractional certificates issued under this act shall be separately registered by the second auditor in books kept for the specific purpose; in each case giving the date, number and amount of the obligations issued, and the name of the person or corporation to whom issued, and the date, number and

amount and description of the bond, bonds or indebtedness surrendered.

10. The plates from which the bonds and fractional certificates, authorized by this act, are printed, shall be the property of the commonwealth, and shall remain in the keeping of the said board of commissioners of the sinking fund.

11. In the year eighteen hundred and ninety, and annually thereafter until all the bonds issued under and by authority of this act are paid, there shall be set apart of the revenue collected two cents on the one hundred dollars of the assessed value of all property in the state, subject to taxation for other purposes, which shall be paid into the treasury to the credit of the sinking fund, and the commissioners of the said sinking fund shall, annually or oftener, apply the same to the redemption or purchase (at a rate not above par) of the bonds issued under this act, and the bonds so redeemed shall be cancelled by the said board, and the same registered by the second auditor in a book to be kept for the purpose, giving the number, the date of issue, the character, the amount and the owner at the time of purchase of the bonds so redeemed and cancelled.

12. Executors, administrators and others acting as fiduciaries, may exchange any state bonds held by them, for bonds issued under this act, when so authorized by the court having jurisdiction in the premises; and the same when so made, shall be considered a lawful investment.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act, as the same shall become due and payable out of any money in the treasury not otherwise appropriated.

14. The several tax collectors of this commonwealth shall receive in discharge of the taxes, license taxes, and other dues, gold, silver, United States Treasury notes, National bank currency, and the temporary loan certificates as hereinafter provided, and nothing else: provided that in all cases in which an officer charged by law with the collection of revenue due the state, shall take any steps for the collection of the same claimed to be due from any citizen or taxpayer, such person against whom such step is taken, if he conceives the same to be unjust or illegal, or against any statute, or to be unconstitutional, may pay the same under protest, and upon such payment, the officer collecting the same shall pay such revenue into the state treasury, giving notice at the time of such payment to the treasurer that the same was paid under protest. The person so paying such revenue may at any time within thirty days, after making such pay-

ment, and not longer thereafter, sue the said officer so collecting such revenue in the court having jurisdiction of the parties and the amount, if it be determined that the same was wrongfully collected, for any reason giving to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded; and thereupon the auditor of public accounts shall issue his proper warrant for the same, which shall be paid in preference to other claims on the treasury. There shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenue illegally, or the attempt to collect revenue in funds only receivable by said officers under this law; the same being other and different funds than the taxpayer may tender or claim the right to pay than such as are herein provided, and no writ for the prevention of an revenue claim, or to hinder or delay the collection of the same, shall in any wise issue either injunction, supersedeas, mandamus, prohibition, or any other writ or process whatever; but in all cases for any reason any person shall claim that the revenue so collected of him was wrongfully or illegally collected, the remedy for such person shall be as above provided, and in no other manner. In all such cases if the court shall certify of record that the officer defendant acted in good faith, and diligently defended the action, the necessary costs incurred by him shall be taxed to and paid by the state as in criminal cases. The commonwealth's attorney of the county or corporation in which suit is brought shall appear and represent the defence. In every case where judgment is rendered for the defendant, a fee of ten dollars shall be taxed in favor of said attorney, and against the plaintiff; and whenever the the Court shall refuse to certify the good faith and diligence of the officer defending the case, a like fee of ten dollars shall be taxed against the said officer. Any officer charged with the collection of revenue who shall receive payment thereof in anything other than that hereinbefore provided shall be deemed guilty of a misdemeanor, and fined not less than one hundred, nor more than five hundred, dollars, in the discretion of the court; but nothing herein contained shall be construed to subject any officer of the state to any suit other than as hereinbefore provided for any refusal on his part to accept in payment of revenue due the State any kind or description of funds, security or paper not authorized by this act.

15. The auditor of the state shall prepare and furnish to the clerk of the county and corporation courts of this commonwealth on or before the fifteenth day of July, eighteen hundred and eighty-two, a book known as temporary loan book, which shall consist of printed forms of certificates and stubs as follows:

| STUB. | CERTIFICATE. |
| --- | --- |
| No.: | No..... County (or City) of..... day of..... 188... |
| Name of tender. | The Commonwealth of Virginia owes of County (or City) Virginia, in consideration of money loaned her to meet a casual deficit in the revenue, and to redeem previous liabilities of the State, under act |
| Date of issue. | day of 1880, dollars, payable on demand, without interest, at the office of the treasurer of Virginia on presentation of this certificate by said |
| Amount of certificate. | in person, at the rate of one for two, or receivable at par by all collectors of taxes for any and all taxes on real or personal property assessed against the above-named tender, for which he is not delinquent, if presented within six months from this date, and not otherwise. Not transferable. |
| Amount of cash received. | ....., Auditor. |

Said stubs and checks shall be signed by the auditor in person or by stencil, and numbered serially, beginning at the number one for each county (or city) and the number for such for each county (or city) shall be at least equal to the number of landowners and property holders therein, on or before the of July; the several clerks of the county and corporation courts of this commonwealth shall execute and forward to the auditor of the state a bond, in the penalty of ten thousand dollars, with security approved by the judge of the county or corporation court of which they are respectively clerks, conditioned faithfully to perform the duties imposed upon such clerk by the provisions of this act, and to account for and pay over to the treasurer of their respective counties on the first of every month, beginning August first, eighteen hundred and eighty-one, for all moneys received under this act; accompanying said temporary loan books, the auditor shall furnish to said clerks printed advertisements, at least five for every election precinct in their respective counties (or cities) as follows: To all good citizens of the county (or city) of state of Virginia:

The commonwealth of Virginia, in order to meet a casual deficit in the revenue, and in order to redeem existing liabilities of the State, desires to borrow from her citizens a sum sufficient to meet said casual

deficit and redeem said liabilities, and solicits from the citizens of this county (or city) subscriptions to a temporary loan. Every citizen of this city (or county) is entitled to subscribe to said loan. Subscriptions to any amount not exceeding in any instance the amount of taxes annually assessed against the land and personal property of the subscriber, for which he is not delinquent, are solicited from the citizens of this county (or city). Any person subscribing to said loan will apply to the clerk of the county (or corporation) court of this county (or city), and upon the payment, in cash, of his subscription to said clerk will receive a certificate of indebtedness dated upon the day of such subscription, acknowledging the liability of the State to him for an amount twice as large as his subscription, payable on presentation of said certificate by him in person at the treasury, at the rate of one for two, or receivable at par by all collectors of taxes for any or all State taxes on real or personal property assessed against him, for which he is not delinquent, if presented within six months from its date, and not otherwise. Not transferable.

....., Auditor.

Upon receipt of said advertisements, said clerks shall immediately post the same at the court-house door of their respective courts, and in at least three public places in each voting precinct of their respective counties (or cities). A similar advertisement shall be inserted by the auditor in some paper published in each of the cities having a corporation court, and in every county in which a paper is published, beginning July 1st, eighteen hundred and eighty-two, at least once a week for eight weeks, inviting subscriptions to said loan.

And any person or corporation so desiring may apply directly to the treasurer of the State to subscribe to said loan, and upon the payment in cash of his or their subscription, shall receive from the auditor a certificate such as is hereinbefore described: provided the same shall not exceed the amount of taxes on real and personal property assessed against him on and after the first February, eighteen hundred and eighty-two. The clerk receiving such book shall receipt for the same, and state in said receipt the number of certificates therein. Upon application of any subscriber, and payment in cash of his subscription, the clerk of the court to whom such payment is made shall fill up the first blank certificate upon his book with the date of payment, the name and residence of the subscriber, and an amount double the subscription. On the stub he shall enter the same, and the actual amount of cash received. If, in making out any certificate, he damages the same so that it become useless, he shall leave it untorn from the book, obliterating the signature and endorsing the stub, and take the next serial number. If any certificates be lost or stolen from said book, he shall forthwith notify the treasurer of his county (or corporation) of

the missing numbers and warn him not to receive the same, and shall likewise notify the auditor of the facts concerning said loss or theft; and on the stub of the last or stolen certificates shall endorse the facts. Upon affidavit of the facts satisfactory to him, any clerk may issue a duplicate for a certificate which has been lost or destroyed to the person entitled thereto, and across the face and on the stub of such he shall endorse, "Duplicate of number ....." The treasurer of the county (or city) shall, on the first day of August, eighteen hundred and eighty-one, and upon the first of each succeeding month, so long as the temporary loan books remain in the hands of the clerk, call upon him for his books. The treasurer shall, upon blanks to be furnished him by the auditor, make up a tabulated statement as follows:

..... Clerk of the county (or city) of ....., in account of the commonwealth of Virginia for subscriptions to temporary loan of eighteen hundred and eighty .... for the month of .....

| Number Certificate. | Name of Subscriber | Date of Issue. | Amount of Certificate. | Amount of Cash Received. | Redeemed. | Not Redeemed. |
|---|---|---|---|---|---|---|
| | | | | | | |

For the amount of cash received by said clerk he shall write his receipt at the foot of said tabular statement, and shall forward a duplicate of said statement and receipt to the auditor. The clerk shall immediately pay over the sum so received by him to the treasurer upon his tendering said receipt. If he fails so to do it shall be the duty of the treasurer to move against him and his securities forthwith upon his bond in the court having cognizance of such motions, and to notify the auditor of his default. It shall be the duty of the clerks of the courts to whom said temporary loan books are transmitted by the auditor, on the first of July next following their receipt, to return the same to the auditor, together with the receipts of the treasurer, for verification. The amount of loan certificates issued to any county or city, shall in no case exceed the aggregate of revenue from taxes on land and personal property due the commonwealth for the current fiscal year by more than ten per centum. Any clerk who shall falsely and fraudulently issue any temporary loan certificate authorized by this act without receiving the cash therefor, at the time it issues, shall

be deemed guilty of a felony, and upon conviction thereof, shall be confined in the Penitentiary not less than one nor more than five years. The county and city treasurers of this state shall receive at par, in payment of state taxes on land and personal property assessed in their counties or cities, which are not delinquent, the certificates aforesaid, issued by the clerk of their county or corporation, when the same are presented by the person to whom they were issued, or his agent, in payment of his state taxes on real or personal property. Said treasurer shall arrange all such certificates redeemed by him according to their serial numbers, and return the same with his accounts to the treasurer of the state. The treasurer of the state shall receive at par, in payment of any state taxes assessed on or after February first, eighteen hundred and eighty-two, due to the commonwealth, which are payable to him directly by law, whether such taxes be delinquent or not, temporary loan certificates issued by the auditor as hereinbefore provided: provided, however, that the aggregate of temporary loan certificates issued directly from the office of the auditor for subscriptions to the treasurer of the state under this act shall not exceed one million dollars. Any treasurer who shall fail to move in the proper court against any clerk who is delinquent for ten days in paying over on the first of the month the amount of temporary loan subscribed for the previous month shall be deemed guilty of a misdemeanor, and on a conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars; and he and his securities upon his official bond shall be liable for the amount due by said clerk; and the county and city treasurers of this State and their securities shall forthwith appear before the court which took their bonds, and so alter the same as to make them embrace their liability under this act; and they shall forward to the auditor a certificate of the clerk that said bonds have been so altered. The clerk receiving said subscriptions shall be entitled to a commission of ---- per centum on all subscriptions received by him under this act, and may deduct the same from such receipts in accounting with the treasurer.

16. All necessary expenses incurred in the execution of this act shall be paid out of any moneys in the treasury not otherwise appropriated on the warrants of the Auditor of Public Accounts, drawn upon the treasurer, on the order of the board of sinking fund commissioners.

17. It shall be the duty of the officers conducting the elections at the several places of holding elections in the state as provided by law, on the first Tuesday after the first Monday in November next, to prepare a separate ballot-box, in which shall be deposited the ballots of the qualified voters of the State who shall desire to vote upon this act. Ballots shall be respectively as follows: "For the Act";

"Against the Act." The ballot so cast shall be deemed and taken as a vote for or against this act. All persons entitled to vote for members of the general assembly shall have the right to vote for or against this act. The manner of receiving and canvassing the ballots cast at such election on the question of the adoption and rejection of this act, and making returns and abstracts of the results thereof shall conform in all respects to the regulations prescribed by the general election laws of this State, except that the certificate of the judges in this respect shall be as follows: "We hereby certify that at the election held on the ..... day of November, eighteen hundred and eighty.... ..... votes were cast 'for the act,' and ..... votes were cast 'against the act.'"

.....
.....
.....
} Signed by the Judges.

And provided, further, that the commissioners of election shall make, on a separate sheet, an abstract of said votes for and against this act, which said abstract shall be duly signed by said commissioners and certified to the secretary of the commonwealth. And if, from such returns and abstracts of votes, it shall appear that a majority of those voting at said election have voted in favor of said act, then it shall be the duty of the secretary of the commonwealth to certify the same to the governor, who shall immediately make proclamation thereof by publication in one or more newspapers published in the city of Richmond, having the largest circulation in the country, and from and after the date of such proclamation, all the foregoing provisions of this act shall be in full force and virtue.

18. This act shall be in force from its passage.

(Signed) B. W. LACY,
*Speaker House of Delegates.*

(Signed) WYATT M. ELLIOT,
*President pro tem. of the Senate.*

This bill did not meet my approval. I communicated my reasons therefor, in message to Senate, March 5, 1880.

(Signed) FRED. W. M. HOLLIDAY.

OFFICE KEEPER OF ROLLS OF VA.

I hereby certify that the foregoing is a true copy from the Rolls in my office this tenth day of June, eighteen hundred and eighty-two.

(Teste) P. H. MCCAULL, *Clerk*,
*House of Delegates and Keeper of Rolls of Va.*

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## APPENDIX D.

CHAP. 84.—AN ACT to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same, and the regular and prompt payment of interest thereon.

Approved February 14, 1882.

Whereas, to the end which this act comprehends, a full statement of the debt is essential; and whereas, the following has been carefully made up from from the records of the second auditor's office of the state, it is confidently submitted as presenting a true state of the account between the state and her creditors—the account is as follows:

(Here follows a long statement in the form of an account stated, which is omitted here.)

And whereas, by this account it appears that Virginia owes her creditors, as of the first of July, eighteen hundred and eighty-two, including the bonds held by the literary fund and arrears of interest thereon, cast to such date, twenty-one million thirty-five thousand three hundred and seventy-seven dollars and fifteen cents, and that she may cause to be issued her own bonds for the same, and provide for the certain payment of interest thereon; that is for her equitable share of the bonds known as consols, and here designated as class A, and whereof there are outstanding fourteen millions three hundred and sixty-nine thousand nine hundred and seventy-four dollars and eighty-one cents; and for her equitable share of the bonds known as ten-forties, and here designated as class B, and whereof there are outstanding eight millions five hundred and seventeen thousand six hundred dollars; and for her equitable share of the bonds known as peeler and here designated as class C, and whereof there are outstanding two million three hundred and ninety-four thousand three hundred and five dollars and twelve cents; and for her equitable share of the interest thereon designated

as class D, and whereof there is now in arrears nine hundred and twenty-eight thousand eight hundred and eighty-seven dollars and forty-five cents, and counted to the first of July, eighteen hundred and eighty-two, makes the amount of such interest then to be in arrears one million seventy-two thousand five hundred and forty-five dollars and seventy-five cents; and for her equitable share of the bonds known as unfunded bonds—dollar and sterling—here designated as class E, and whereof there are now outstanding, computed at two-thirds, three million seven hundred and seventy-three thousand four hundred and ninety-three dollars and sixty-eight cents; and for her equitable share of the interest thereon now in arrears, two million six hundred and thirty-six thousand four hundred and forty-four dollars and thirty-four cents, and counted to the first of July, eighteen hundred and eighty-two, making as of that date (two hundred and twenty-six thousand four hundred and nine dollars and sixty-two cents more), the sum or two million eight hundred and sixty-two thousand eight hundred and fifty-three dollars and ninety-six cents, and here designated as class F; and for her equitable share of the bonds held by the commissioners of the literary fund, whereof there are one million four hundred and twenty-eight thousand two hundred and forty-five dollars and twenty-five cents; and whereas, the rate of interest which any people can safely undertake to pay must be determined by the measure of their productive resources; and whereas, these have long been burdened by a rate of taxation which is conceded to be as high as can be endured; and whereas, the means of prompt and certain payment should be apparent to the creditors, while the people have assurance for the support of government and the maintenance of their schools, as required by the constitution; and whereas, the net revenues of the state remaining and so derived, after providing for the proper and gradual liquidation of the balance of the moneys heretofore diverted from the public free-school fund, after liquidating gradually the arrearages to the literary fund, and leaving some small margin for the immediate and subsequent exigencies, which are and are likely to be demanded by the public welfare, notably in respects of the humane institutions now inadequate to the proper accommodation of that unfortunate class of every population—do not warrant the assumption of a larger rate of interest than three per centum upon the full amount of Virginia's equitable share of the debt, old and entire state, as the same is ascertained and now formerly declared by the foregoing account; therefore,

1. Be it enacted by the general assembly of Virginia, that the board of commissioners of the sinking fund of the State be, and they are hereby empowered and directed to create bonds, registered and

coupon, to such extent as may be necessary to comply with the provisions of this act.

2. The said bonds shall be dated July 1st, 1882, and be payable at the office of the treasurer of the state on the first day of July, nineteen hundred and thirty-two ; provided that the state may, at any time, and from time to time, after July first, nineteen hundred, redeem any part of the same, principal and interest, at par. In case of such redemption before maturity, the bonds to be paid shall be determined by lot by said board of commissioners, and notice of the bonds so selected to be paid shall be given in a newspaper published at Richmond, New York, and London, England, when interest from and after ninety days from date of such publication in London shall cease upon the bonds so designated to be paid.

3. The form of the bond shall be as follows, to wit :

The commonwealth of Virginia acknowledges herself indebted to ..... (in the case of a coupon bond to the bearer, and in case of a registered bond inserting the name of the person or corporation), in the sum of ..... dollars, which she promises to pay in lawful money of the United States, at the office of the treasurer of the state, Richmond, Virginia, on the first day of July, nineteen hundred and thirty-two, with the option of payment at par, principal and interest, before maturity, at any time after July 1st, nineteen hundred ; and interest at the office of the treasurer of the state, in such lawful money, on the 1st days of January and July, at the rate of three per centum per annum, until paid (according to the tenor of the annexed coupons, in the case of coupon bonds).

In testimony whereof, witness the signature of the Treasurer, and the counter-signature of the second auditor, hereto affixed according to law.

....., *Treasurer.*
....., *Second Auditor.*

4. The form of coupon for coupon bonds shall be as follows, to wit:

No. ..... (of Bond).

The Commonwealth of Virginia will pay to bearer ..... dollars, in lawful money of the United States, at the office of the Treasurer, Richmond, Virginia, on the first day of January and July, alternately. The first coupon to be payable January first, eighteen hundred and eighty-three.

....., *Treasurer.*

$.....

Each coupon to be impressed on the back with its number, in the order of maturity, from one forward.

5. The said board of commissioners are authorized to issue such bonds, in denominations of five hundred and one thousand dollars, as may be necessary to carry out the provisions of this act, each denomination to be of different tint, provided that registered bonds may be issued of any denomination, multiple of one hundred; all registered bonds to be of the same tint; and they are authorized and directed to issue such bonds, registered or coupon, in exchange for the outstanding evidences of debt hereinbefore enumerated, including the bonds held by the literary fund, as follows, that is to say:

(*a*) For her equitable share of class A, at the rate of fifty-three per centum; that is to say, fifty-three dollars of the bonds authorized under this act (principal and accrued interest, at par, from the preceding period of maturity to the date of exchange), are to be given for every one hundred dollars, face principal and accrued interest from the preceding semi-annual period of maturity to the date of exchange of such evidence of debt, and for any interest which may be past due and unpaid upon the same, funded bonds issued under this act may be given, dollar for dollar.

(*b*) For her equitable share of class B, at the rate of sixty per centum, reckoning and accounting for any interest, as provided in the case of class A.

(*c*) For her equitable share of class C, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A and B, and accounting for same as provided in class D.

(*d*) For her equitable share of class D, at the rate of eighty per centum.

(*e*) For her equitable share of class E, at the rate of sixty-nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A, B and C, and accounting for the same as provided in class F.

(*f*) For her equitable share of class F, at the rate of sixty-three per centum.

(*g*) For here equitable share of the bonds of the literary fund, as in the case of class C; her equitable share of the arrearages of interest—three hundred and seventy-nine thousand two hundred seventy dollars—to be paid in money.

6. For all balances of such indebtedness, constituting West Virginia's share of the old debt, principal and interest, in the settlement of Virginia's equitable share as aforesaid, the said board of sinking fund commissioners shall issue a certificate, as follows:

No.....

The commonwealth of Virginia has this day discharged her equitable share of the (registered or coupon, as the case may be) bond for .....dollars, held by....., dated the.....day of....., and numbered...., leaving a balance of..... dollars, with interest from....., to be accounted for by the state of West Virginia, wiihout recourse upon this commonwealth.

Done at the capitol of the State of Virginia, this.....day of ....., eighteen.....

....., *Second Auditor.*
....., *Treasurer.*

7. The said board of commissioners are empowered to issue for any fractional part of one hundred dollars of the indebtedness funded under this act, the following certificate:

FRACTIONAL CERTIFICATE.

Register No..... Transaction No....

This certificate entitles the holder hereof to the sum of..... dollars, fundable at its face in the bonds of the commonwealth of Virginia, authorized by an act approved.....day of....., eighteen hundred and eighty-two, when presented with certificates of like tenor or in conjunction with other evidences of debt fundable under said act amounts of one hundred dollars and multiples thereof.

Done at the capitol of Virginia, this.....day of....., eighteen hundred and eighty.....

....., *Second Auditor.*
....., *Treasurer.*

The certificates so issued shall be registered by the second auditor in a register kept for that specific purpose, giving the date and number of the transaction to which it relates, the amount of the same, and the name of the person or corporation to whom it was issued; and as such certificates are refunded, the same shall be cancelled and preserved, as herein provided in respect to the evidences of debt refunded.

8. All the bonds and certificates of debt, and evidences of past-due and unpaid interest taken in under the provisions of this act, shall be cancelled by the Treasurer in the presence of the board of commissioners of the Sinking Fund as the same are required, and by the treasurer the same shall be carefully preserved until such time as the general assemby may otherwise direct. A schedule of the bonds, certificates and other evidences of debt so cancelled, from time to time, shall be certified by said board and filed with the treasurer for preservation.

9. All the coupons and registered bonds and fractional certificates issued under this act shall be separately registered by the second auditor in books kept for the specific purpose ; and in each case giving the date, number and amount of the obligation issued, and the name of the person or corporation to whom issued, and the date, number and description of the bond, bonds or indebtedness surrendered.

10. The plates from which the bonds and fractional certificates authorized by this act are printed shall be the property of the commonwealth, and shall remain in the keeping of the said board of commissioners of the sinking fund.

11. In the year eighteen hundred and ninety, and annually thereafter until all the bonds issued under and by authority of this act are paid, there shall be set apart of the revenue collected from the property of the State each year two and one quarter per centum upon the bonds at the time outstanding, which shall be paid into the treasury, to the credit of the sinking fund ; and the commissioners of the sinking fund shall, annually or oftener, apply the same to the redemption or purchase (at a rate not above par) of the bonds issued under this act, and the bonds so redeemed shall be cancelled by the said board, and the same registered by the second auditor in a book to be kept for the purpose, giving the number, the date of issue, the character, the amount, and the owner at the time of purchase of the bonds so redeemed and cancelled ; and in case no such purchase of bonds can be made, the amount which can be redeemed shall be called in by lot, as provided by section two of this act.

12. Executors, administrators and others acting as fiduciaries, may exchange any state bonds held by them, as provided, for bonds issued under this act, when so authorized by the court having jurisdiction in the premises, and the same when so made shall be considered a lawful investment.

13. The treasurer of the commonwealth is authorized and directed to pay the interest on the bonds issued under this act, as the same shall become due and payable, out of any money in the treasury not otherwise appropriated.

14. All necessary expenses incurred in the execution of this act shall be paid out of any money in the treasury not otherwise appropriated, on the warrants of the auditor of public accounts, drawn upon the treasurer, on the order of the board of sinking fund commissioners.

15. That from and after the passage of this act no bonds, certificates or other evidences of indebtedness, shall be issued for any portion

of the debt of this State, nor shall any interest be paid upon any part or portion of said debt, except as hereinbefore provided.

16. This act shall be in force from its passage.

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## APPENDIX E.

In the Winter of 1880, the "Readjuster" party elected new county judges for all the counties in the State. They nominated for judge of Franklin County one Thomas B. Claiborne; after he was nominated, but before he was elected, General Jubal A. Early wrote to their caucus the following letter, which was printed, before his election, in all the Richmond papers. Though the party was pressed in both bodies of the Legislature to investigate the charges before they elected Claiborne, the caucus refused to make more than a pretended investigation of them, and they elected this man Judge of Franklin County, of which he is now Judge, though all the State knew what his character was. No coupon holder would be strongly tempted to commit his coupons to Judge Claiborne's custody.

EXCHANGE HOTEL,
January 9th, 1880.

I have known Thomas B. Claiborne, reported in the morning papers as the nominee of the predominant party in the Legislature for Judge of the County Court of Franklin, from his earliest boyhood, and I can assert, from my knowledge of the man, that he is wholly unfit for the position for which he has been nominated, as well in point of character as qualifications otherwise. From the time he grew to manhood he has been a gambler—what is known as a professional gambler—of the lowest order, and, except for a time, when he was an employé of the United States Revenue Department, as a guager of stills or something of that sort, he has never followed any other occupation than that of gambling that I have heard of. His general and notorious reputation, wherever he is known, is that of being a cheating gambler, who uses marked cards and all the contrivances for swindling in use among gamblers of the lowest sort. Besides his reputation in this respect, I have received such information from persons acquainted with his acts as to leave no doubt on my mind on the subject and justify me in stating, as an indisputable fact, that he is a swindling gambler of the very lowest order. He was not in Virginia

during the war, but, according to his own account, as I have received it from persons to whom he gave the statement, he was in Kentucky, inside of the enemy's lines. I am informed that he has given two accounts of his position there—the latest, given after he joined the Republican party, being that he was all the time a strong Union man. After the close of the war he returned to Franklin, bringing with him, as I was informed by a man in whose statement I have implicit reliance, an ingenuously devised instrument, with a clasp, to hold a hand at cards, to be worn in the breast under the vest, which, being connected with the leg and foot by some sort of machinery and wires, could be thrust out so as to exchange the hand it contained for the one dealt. My informant told me that Claiborne proposed to him to go in with him in using this instrument, as it was "bound to win." I have since been informed that the instrument, which I have never seen, is known among "the profession" as a "lizzard." There is a gentleman, a native of Franklin, now living in Richmond, who has seen the identical instrument in the hands of a person with whom this man Claiborne had left it for the purpose of being mended. After he became a Republican, Claiborne was for some time an employé of the Revenue Department, but has been discharged, as I have understood, for untruthfulness, if not for graver cause.

It is very disagreeable for me to make this statement, as a number of the very near relatives of this man are among my warmest friends, and a brother of his served under me as a Lieutenant-Colonel of cavalry, proving himself a gallant soldier; but I cannot remain quiescent and permit so gross an outrage to be inflicted on the people of my native county, and so foul a stain put upon the character of the judiciary of the State as would be the election of this man to the position for which he has been nominated without at least giving those who propose so to elect him the opportunity of knowing what they are doing.

The present incumbent, Thomas H. Bernard, is a man of comparatively humble origin. His grandfather was a soldier of the Revolution, and though a plain laboring man, was one of unimpeachable character and universally respected by all classes. His father was a tanner by trade, and he himself was brought up in his father's tanyard.

By his own exertions mainly he acquired an excellent English education. He was, under the former condition of things, at one time presiding justice of the County Court of Franklin, and has made a very excellent and efficient Judge of the County Court, being universally esteemed by the bar as well as by the people for his intelligence and sterling integrity.

He has risen from a comparatively humble walk in life, and is a gentleman in every essential requisite of the term, while the man now proposed to fill his place belongs to one of the oldest and most noted families in the State, and has fallen so low as not to be a fit associate for honest men of any class.

(Signed) J. A. EARLY."

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## APPENDIX F.

STATE OF VIRGINIA, *City of Richmond*, } to wit:

PLEAS, AT THE COURT HOUSE OF THE CITY OF RICHMOND BEFORE THE HUSTINGS COURT OF THE SAID CITY, ON THE 27TH DAY OF MAY, 1882.

Be it remembered, that heretofore, to wit, at a Hustings Court held for the said city at the Court House, on the 19th day of May, 1882, came G. Watt Taylor, by Richard L. Maury and William W. Crump and Beverly Tucker Crump, Esquires, his attorneys, and filed his petition, which is in the words and figures following, to wit:

*To the* HON. G. L. CHRISTIAN,

*Judge of the Hustings Court of Richmond City:*

Your petitioner, G. Watt Taylor, respectfully represents unto your Honor, that he is a citizen and a taxpayer of Richmond and of Virginia; that on the 17th day of May, 1882, being indebted to the State of Virginia $150 for his license tax, he tendered S. C. Greenhow, or S. G. Tinsley, his assistant, treasurer of said city, and the officer appointed by law to receive said tax, in payment of so much thereof, $150 in coupons, as per schedule herewith, cut from the bonds of said Commonwealth, which by law are receivable for all taxes, debts and demands due the State of Virginia, who received the same for the purpose of identification and verification, and forwarded them to this Court for that purpose, according to law. See his receipt therefor, herewith filed and marked "Exhibit G. W. T.," which is in the words and figures following:

"RICHMOND, May 17, 1882.

Received of G. Watt Taylor one hundred and fifty dollars in tax-receivable coupons, to be handed Judge G. L. Christian for identification and verification, said coupons tendered for liquor license, &c., and said license also paid in money.

S. G. TINSLEY, A. T.

No. 1457, 17,696, 17,735, 7,641, 8,810 } Five of $30 due January, 1882.

Exhibit G. W. T."

And thereupon your petitioner paid him the full amount of his tax in money. Your petitioner alleges that said coupons are genuine legal coupons, and are legally receivable for all taxes, debts and demands due the Commonwealth of Virginia, and prays that a jury be empannelled to try the question whether they are genuine legal coupons legally receivable for taxes, debts and demands due the Commonwealth of Virginia.

He prays that the State of Virginia be summoned to answer this petition, and that when said coupons are ascertained to be genuine legal coupons receivable for all taxes, debts and demands due the Commonwealth of Virginia, that this Court will so certify, to the end that he may receive back the money so paid by him as aforesaid, according to law.

And your petitioner will ever pray.

G. WATT TAYLOR,
*By Counsel.*

RICHARD L. MAURY, H. W. & BEV. T. CRUMP, } *P.-q.*

Whereupon it was ordered that Samuel B. Witt, attorney for the Commonwealth for this city, upon being previously served with a copy of the order of said Court entered on this day, appear before said Court on the 23d day of May, 1882, and answer the said petition, which order, with the return of the sergeant thereon, is as follows:

"In the Hustings Court of the City of Richmond, May 19th, 1882. This day G. Watt Taylor filed his petition in this Court alleging that certain tax-receivable coupons, therein described, and amounting to the sum of one hundred and fifty dollars, had been tendered by him to S. C. Greenhow, treasurer of this city, or his assistant, in payment of certain taxes due the Commonwealth by said petitioner, which said coupons were received by said officer, and have been delivered by him, securely sealed up, to the Judge of this Court, and that the said petitioner had paid the said sum of one hundred and fifty dollars in

money to the said officer in payment of said tax. Whereupon, it is ordered that Samuel B. Witt, attorney for the Commonwealth for this city, upon being previously served with a copy of this order, appear before this Court on the 23d day of May, 1882, and answer the said petition.

(A copy.)

(*Teste*) ANDREW JINCKINS, *Clerk.*"

(Returned.) Executed the 20th day of May, 1882, on S. B. Witt, attorney for the Commonwealth, by delivering to him a true copy of the within.

J. LOVENSTEIN, *D. S.*

And at another day, to wit, at the same Hustings Court, continued by adjournment, and held for the said city at the Courthouse, on the 24th day of May, 1882, came the petitioner by his attorneys, and Samuel B. Witt, the attorney for the Commonwealth for this city, also appeared, in accordance with the summons heretofore awarded in this cause, as well as Frank S. Blair, the Attorney General of this State, who together filed their answer for the Commonwealth to the prayer of the petitioner, which answer is as follows:

"IN THE HUSTINGS COURT OF THE CITY OF RICHMOND.

G. WATT TAYLOR

*vs.*

THE COMMONWEALTH.

Upon petition under Chapter 7, Acts 1881–2, Approved January 14, 1882.

"To the Hon. GEORGE L. CHRISTIAN,

*Judge of the Hustings Court of Richmond City:*

The Commonwealth of Virginia, for answer to the said petition by S. B. Witt, Esq., Attorney for the Commonwealth for said city, comes and says:

That bonds purporting to be the bonds of the Commonwealth, issued by authority of the act March 30th, 1871, entitled an act to provide

for the funding and payment of the public debt, and under the act of March 28, 1879, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law ; and other such bonds are in existence which are spurious, stolen or forged, which bonds bear coupons, in the similitude of genuine coupons receivable for all taxes, debts and demands due the Commonwealth, and that the genuine coupons from genuine bonds, after having been received in payment of taxes, debts and demands, are fraudulently reissued and received more than once in such payment ; that such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the Commonwealth with them ; that the coupons thereon should be received in payment of all taxes, debts and demands due the Commonwealth, and at the same time defrauds her out of her revenues.

Therefore, the Commonwealth comes and prays the Court that a jury be empannelled to try the question as to whether the paper, instrument, writing or engraving, purporting to be coupons detached from bonds of the Commonwealth, issued under aforesaid acts and tendered as named in said petition, are genuine, legal coupons, which are legally receivable for taxes, debts and demands ; that on such trial an issue be framed between the petitioner as plaintiff, and the Commonwealth as defendant, and proof be required of plaintiff of the genuineness and legality of the coupons in issue, and as such legally receivable in payment of taxes.

And as in duty bound respondent will ever pray, &c.

THE COMMONWEALTH OF VIRGINIA.

S. B. WITT,
F. S. BLAIR,
For the Commonwealth."

And tendered to the Court two special pleas in writing, verified by the oath of D. R. Riveley, Treasurer of the Commonwealth of Virginia, which pleas are in the words and figures following, to wit :

"IN HUSTINGS COURT OF RICHMOND CITY.

G. W. TAYLOR
*vs.*
THE COMMONWEALTH.

PLEAS.

*First Plea.*—The Commonwealth of Virginia, by S. B. Witt, the Commonwealth's Attorney for the City of Richmond, comes and defends the wrong and injury, and for a plea says, that the paper, instru-

ment in print, writing or engraving purporting to be a coupon detached from a bond of the Commonwealth issued under the act of 1871, entitled an act to fund the public debt, &c., is not a genuine, legal coupon, which is legally receivable for taxes, debts and demands due the Commonwealth, and this she is ready to verify, &c.

Wherefore she prays judgment, &c.

*Second Plea.*—And for a further plea in this behalf, the said Commonwealth comes and says, that by the act of the General Assembly, approved April 22d, 1882, Sessions Act 1881–2, for the assessment of taxes on persons, property, incomes and licenses, and imposing taxes thereon for the support of the Government and free schools and pay the interest on the public debt (Section 115 thereof), all taxes assessed by this (that) act upon licenses, shall be paid in lawful money of the United States, before the person applying for said license shall be entitled to receive the same. Wherefore defendant says that the paper, instrument in print, writing or engraving purporting to be a coupon detached from a bond of this Commonwealth issued under the act of 1871, entitled an act to fund the public debt, &c., is not legally receivable for the license named in said petition, and this she is ready to verify. Wherefore she prays judgment, &c.

VIRGINIA, }
*Richmond City*, } to wit:

This day personally appeared before me the undersigned, R. D. Ward, authorized to take and certify oaths, &c., D. R. Riveley, and , Treasurer, and of the Commonwealth of Virginia, who made oath in due form of law that the foregoing pleas are true, to the best of their knowledge, information and belief.

R. D. WARD,
*N. P.*"

To which answer and pleas the petitioner replied generally, and put himself upon the country, and the defendant likewise, and thereupon came a jury, to wit: William F. Harwood, B. C. Baylor, Stuart D. Craig, R. H. Duke, Charles Early, Abbott E. Lloyd, Thomas T. Mayo, Joseph G. Mettert, David E. Lamsden, Henry Grinnell, E. T. Clopton and Gustavus Millhiser, who were sworn to try the following issue, to wit: "Whether or not the papers, or instruments in print, writing or engraving, described in the petition and to be offered in evidence by the petitioner, purporting to be coupons detached from bonds of the Commonwealth, issued under the act of 1871, entitled an act to fund the public debt, are genuine, legal coupons, which are legally receivable for taxes, debts and demands due the Commonwealth, and a true verdict render according to the evidence"; and having partly

heard the evidence, for reasons appearing to the Court, the said jury were adjourned till the then next Friday morning at ten o'clock, until which time the further consideration of this cause was continued.

Memorandum. During the progress of the trial of this cause this day the defendants excepted to two decisions of the Court given against her, and tendered one of her bills of exceptions, which was received, signed and sealed by Court, and made part of the record hereof, and time was allowed her until the then Saturday next to prepare her second bill of exceptions.

And, at another day, to wit: At the same Hustings Court, continued by adjournment, and held for the said city, at the Courthouse, on Friday, the 26th day of May, 1882, came again the parties by their attorneys, and the jury sworn on Wednesday last for the trial of this cause also appeared according to their adjournment, and the evidence having been fully heard, the said jury returned a verdict in these words—"We, the jury, find for the petitioner upon the issues joined: And we also find that the coupons mentioned in the exhibit filed with the petition, and presented to us by the Court, to wit the five coupons for $30 each, numbered 1457, 17696, 17735, 7641, 8810 are genuine, legal coupons, legally receivable for all taxes, debts demands and dues due the Commonwealth of Virginia." The defendant thereupon moved the Court to set aside the said verdict on the ground that the same is contrary to the law and the evidence, and grant her a new trial, which motion the Court overruled. Whereupon it is considered by the Court that the said coupons set out in the said verdict are genuine, legal coupons, receivable for all taxes, debts, demands and dues of the Commonwealth of Virginia, which is ordered to be certified by the treasurer, as directed by law, to refund the money heretofore paid by the plaintiff for his taxes, as in his petition is alleged. And it is further ordered that the clerk of this Court shall seal up and deliver to the plaintiff, or his attorneys, the coupons referred to in the foregoing verdict and judgment, taking a receipt for the same and filing said receipt with the papers in this cause.

Memorandum. During the progress of the trial of this cause this day the defendant excepted to two decisions of the Court given against her, and tendered one bill of exceptions (which is numbered 3), which was received, signed and sealed by the Court and made part of the record hereof, and time was allowed her till the then to-morrow to prepare the other bill of exceptions.

And now, at this day, to wit: At the same Hustings Court, continued by adjournment, and held for the said city on Saturday, the 27th day of May, 1882 (being the same day and year first hereinbefore written), came again the parties by their attorneys, and the defendant, in accordance with the leave heretofore granted her, tendered to the Court her two bills of exceptions (numbered 2 and 4), which were

received, signed and sealed by the Court, and made parts of the record hereof. And on motion of the attorneys for the Commonwealth, who represent that they desire to present a petition to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas to the judgment of this Court entered on yesterday, it is ordered that the execution of the said judgment be suspended for thirty days from this day, in order to allow them time to apply to the Supreme Court of Appeals of Virginia for said writ of error and supersedeas.

The bills of exception tendered by the defendant, and received, signed and sealed by the Court during the progress of this trial, and heretofore mentioned, are in the words and figures following, to wit :

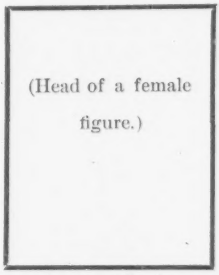
"G. WATT TAYLOR
*against*
COMMONWEALTH OF VIRGINIA.
} *Bill of Exceptions No.* 1.

Be it remembered, that on the trial of this cause the petitioner, to maintain the issue on his part, introduced one John L. Shackelford as a witness, who testified that he had been a clerk in the Second Auditor's office about twenty five years, and was familiar with the coupons of the State bonds issued under the act of March 30, 1871 ; had handled about seven millions of said coupons, and had never seen nor heard of a counterfeit coupon ; thereupon certain coupons purporting to be coupons from State bonds were presented to the witness, being the same coupons now in the custody of the Court, and referred to in the petition and in the issue, and he was asked by the counsel for the petitioner if they were the coupons of the State of Virginia ; to the introduction of which coupons the Commonwealth's attorney objected until the bonds to which the said coupons were purported to be attached, and from which they were purported to be detached, were presented in Court ; which objection the Court overruled, and the said coupons were read by the jury in words and figures following, to wit :

(*Face.*)

"Receivable at and after maturity for all taxes, debts and demands due the State.

Commonwealth of Virginia
Will pay the bearer
THIRTY DOLLARS,
Interest due 1st Jan'y, 1882,
on Bond No. 1457.




Coupon No. 21.

GEO. RYE, Treasurer
of the Commonwealth of Virginia.

NATIONAL BANK NOTE CO., NEW YORK.

(*Reverse.*)

Receivable at
and after maturity
for all taxes,

21

debts and demands
due the State.

NATIONAL BANK NOTE CO., NEW YORK.

(*Face.*)

"Receivable at and after maturity for all taxes, debts and demands due the State.

Commonwealth of Virginia

Will pay the bearer

THIRTY DOLLARS,

Interest due 1st Jan'y, 1882,

on Bond No. 17696.

(Head of a female figure.)

Coupon No 21.

GEO. RYE, Treasurer

of the Commonwealth of Virginia.

NATIONAL BANK NOTE CO,, NEW YORK.

(*Reverse.*)

"Receivable at

and after maturity

for all taxes,

21

debts and demands

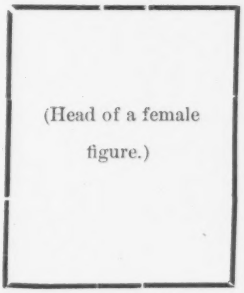
due the State.

NATIONAL BANK NOTE COMPANY, NEW YORK.

(*Face.*)

"Receivable at and after maturity for all taxes, debts and demands due the State.

Commonwealth of Virginia
Will pay the bearer
THIRTY DOLLARS,
Interest due 1st Jan'y, 1882,
on Bond No. 17735.



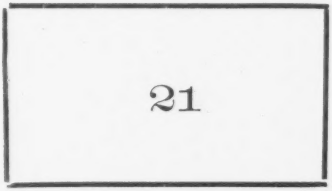

Coupon No. 21.

GEO. RYE, Treasurer
of the Commonwealth of Virginia.

NATIONAL BANK NOTE CO., NEW YORK.

(*Reverse.*)

"Receivable at
and after maturity
for all taxes,




debts and the demands
due the State.

NATIONAL BANK NOTE COMPANY, NEW YORK.

(*Face.*)

"Receivable at and after maturity for all taxes, debts and demands due the State.

Commonwealth of Virginia

Will pay the bearer

THIRTY DOLLARS,

Interest due 1st Jan'y, 1882,

on Bond No. 7641.

Coupon No. 21.

GEO. RYE, Treasurer

of the Commonwealth of Virginia.

NATIONAL BANK NOTE CO., NEW YORK."

(*Reverse.*)

"Receivable at

and after maturity

for all taxes,

21

debts and demands

due the State.

NATIONAL BANK NOTE COMPANY, NEW YORK.

(*Face.*)

"Receivable at and after maturity for all taxes, debts and demands due the State.

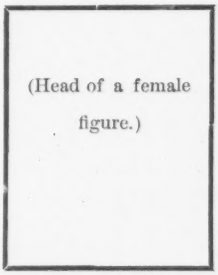
Commonwealth of Virginia

Will pay the bearer

THIRTY DOLLARS,

Interest due 1st Jan'y, 1882,

on Bond No. 8810.




Coupon No. 21.

GEO. RYE, Treasurer

of the Commonwealth of Virginia.

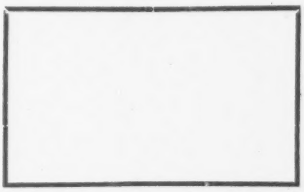
NATIONAL BANK NOTE CO., NEW YORK.

(*Reverse.*)

"Receivable at

and after maturity

for all taxes,



debts and demands

due the State.

NATIONAL BANK NOTE COMPANY, NEW YORK.

To which ruling of the Court in overruling the said objection, the Commonwealth excepts, and files her bill of exceptions, which she prays may be signed, sealed and made a part of the record in this case.

GEO. L. CHRISTIAN. SEAL. "

G. WATT TAYLOR
*against*
COMMONWEALTH OF VIRGINIA.
} *Bill of Exceptions No.* 2.

Be it remembered, that upon the trial of this cause the plaintiff, to prove the issue upon his part, introduced J. L. Shackelford as a witness, who testified that he believed that the coupons shown him, which were the subject of this suit (see coupons copied in bill of exceptions No. 1 of this record), were genuine coupons of the Act of 1871, and are receivable for taxes; that he had no doubt whatever about their genuineness; that he was now as he had been for twenty-five years, first clerk in the office of the Second Auditor, and that it was his duty to receive and examine all the coupons which had been paid for taxes, &c.; that in the course of that duty he had received and examined upwards of seven millions of dollars of the coupons cut from the bond of 1871: that the bonds themselves were signed in manuscript by George Rye, Treasurer, but the signature on the coupons were engraved in facsimile of said George Rye's signature, and were in accordance with law; that he was perfectly well acquainted with the signature of George Rye, the Treasurer of the Commonwealth, and that the signature engraved upon the coupons is an exact facsimile of that signature; that he had no distinct recollection of having seen the coupons in controversy before, but he had no doubt that they were coupons which had attached to bonds which had passed through his hands; that when old bonds were brought to his office to be funded under the act of 1871, the exact amount to begin therefor in new bonds, was calculated by him and a requisition therefor made on the Treasury, which adjoined his office, and thereupon the new bonds were sent into his office from the Treasury to be signed by the Second Auditor, and when so signed, were delivered by him with the coupons attached, and he had no doubt that these coupons were attached to the bonds corresponding in number with the numbers on said coupons, and so were delivered by him; that there was a register of all the bonds

issued, kept in the Treasury, which showed their number, date and class, and the number of coupons attached to each when issued, it also showed what coupons of each bond had been paid, that fact being noted on the register, which register he then had before him; that he found upon examination of that book, that it contains the number of the bonds corresponding with the numbers on these coupons, thus showing that bonds of that number were issued, and showing also, that all of the coupons of said bonds which matured up to and including July 1st, 1881, had been received and cancelled, and that these coupons in issue in this trial had not been received or cancelled. He further stated that it appeared also in the books of the Second Auditor's office, that coupon bonds answering to the numbers of these coupons were actually from that office, and were receipted for on said books by the parties receiving them, and that said bonds were payable to bearer (and the defence dispensed with the production of said book, and agreed the facts stated would appear therein); that he firmly believed that there were only one of each of the coupons of the numbers named, corresponding with the bond from which they had been detached, issued; the plate from which they had been engraved had always been in the custody of the Bank Note Company in New York, but the Commonwealth of Virginia always considered it under her control, and had left it with said company for safe keeping, as he believed the said company was perfectly honest and reliable, and that he has never known of a duplicate coupon. It is true that ninety-one thousand of coupons were reported missing by the Legislative Committee; that he had examined the treasurer's register, which were brought into Court, and these coupons appear never to have been received for taxes; that to be more particular, Geo. Rye, as Treasurer, signed one original set of coupons in manuscripts, and all the other coupons were facsimiles thereof, as he believed, but of this he had no personal knowledge, as the original plates have all the time been in the hands of the National Bank Note Company, and that they had all opportunities to repeat and issue any quantity of coupons of any particular denomination or number that they might see fit, although he did not believe that the said company have done so—that these were true and genuine facsimiles of said Rye's original signature, but whether or not these coupons have ever been duplicated by the Bank Note Company, or any one else, he could not say, but he believed that they were genuine, as well because of his great familiarty with the millions of bonds and coupons handled by him in the course of his business, and which he knew to be genuine, and for other reasons, as from the fact that the name of the National Bank Note Company was stamped on the coupons; that he was familiar with the coupons engraved by the company and was satisfied that these were

genuine; that said company had the contract to engrave the same according to law, and that they were paid for the said work, and he knew they were of high commercial integrity, and he never had known anything wrong in their business matters; that while their books indicated that these coupons were regular, that of course depended upon the fidelity with which said books were kept, and if the said Bank Note Company, or the Second Auditor's, or Treasurer's office were irregularly or improperly conducted, it was possible for coupons to be unlawfully issued.

Whereupon the Commonwealth's representative moved the Court to exclude the said evidence from the jury as improper, but it being stated by the counsel for Petitioner that they had other evidence of a similar character, the representative of the Commonwealth, without waiving their objection, consented to suspend it until such other evidence was introduced.

Whereupon Petitioner, to further maintain the issue upon his part, introduced Gen. Asa Rogers, who stated that he had been Second Auditor of the Commonwealth of Virginia for about twelve years, and that he had heard the evidence of Mr. Shackelford, and adopted it as his own so far as it referred to the mode by which the bonds were issued, and the genuineness of the coupons in controversy were concerned, for the reasons stated by him, and others. That he was Second Auditor when the funding of the bond under the act of 1871 was performed, under which twenty millions of bonds were issued, having about forty million of coupons like these attached, and the method of funding was that the new bonds, which had been engraved in New York, were first taken to the Treasurer's Office, where they were signed in manuscript by Geo. Rye, Treasurer, and having the coupons upon them engraved with a facsimile signature of said Geo. Rye, Treasurer, and they were brought then to his office, where they were countersigned by witness, as the law directed; that he thought that the coupons in question were genuine because they resembled the thousands of coupons that had been received and cancelled at his office, and the signature on them was a facsimile to Geo. Rye's signature with which he was acquainted, and because they were engraved by the National Bank Note Company in the highest style of the art known to the world, to prevent forgery, which said company was beyond dispute of good reputation, and one of the largest establishments of the sort in the world, and had the confidence and patronage of our National and many Foreign Governments in lithographing and engraving these bonds; that it was true that, as the said company always had the original plates in their possession, they could if they chose so to do, duplicate any number of the coupons, but he did not believe that they had done so, because they were too honest and faithful to do it. The witness

further stated that it was true, or at least was reported by the committee for the examination of the Second Auditor's office, that of ninety-one thousand dollars of coupons, some had been received before due, others were uncancelled, and the balance missing and unaccounted for, and that both the Treasurer's and Second Auditor's office had been more or less exposed during the progress of said committee's examination ; that he had no personal knowledge of the genuineness of the coupons in issue, having not seen them signed, or their facsimiles made, but it was a matter of belief with him, and that his belief was founded upon the various circumstances enumerated by him. He was in office till January 2d, 1880 ; the bonds were issued as described by Mr. Shackelford ; being shown the coupons in controversy, he stated that he was satisfied they are genuine and had been issued from his office, and that he would accept them from their holder. The contract for printing the bonds under the act of 1871 was made with the National Bank Note Company, and the bonds were delivered to the Treasurer and paid for by the State.

The coupons in my office were kept in presses locked, and Mr. Shackelford always had the key. The bonds and coupons were engraved at a large cost in the highest style of art known, and are exceedingly hard to counterfeit. The cost of engraving them was between $25,000 and $30,000. The plates from which they were engraved have always been in the keeping of the engraving company, but subject to the order of the Second Auditor ; it has several times been discussed in the Legislature whether the State should not bring these plates and keep them here, but I have been determined to leave them where they are. I once went to New York, while auditor, to satisfy myself that they were safe there, and concluded that they were, from what the company told me, and from what I saw of their vaults, in which the plates were said to be. I never knew of any coupons being presented a second time ; Mr. Shackelford was my principal clerk, and is still occupying the same position in the office ; he examined nearly every coupon that came in, and I consider him the expertest expert I ever saw. Nearly all of these coupons were received by the collectors of the taxes throughout the country, and were by them sent or brought into the Second Auditor's office ; when they came into the Second Auditor's office the County Treasurer was required to endorse his name thereon stating that the tax had been deducted therefrom. Afterwards the law was changed so as to require the persons paying in the coupons himself to endorse his own name upon them, together with the date when they were paid in ; such was the requirements of the law, and, so far as I know, it was complied with ; it was not my duty to see that this was done, but was that of Mr. Shackelford.

The representatives of the Commonwealth then renewed their motion to exclude all the evidence of both witnesses as being improper and inadmissable testimony, which motion was overruled by the Court, who permitted the said testimony to be received, and it was received and submitted to the jury. To which ruling of the Court the representatives of the Commonwealth excepted, and to save benefit of same file this their bill of exceptions, and pray that the same may be signed, sealed, and made a part of the record in this case, which was accordingly so done.

GEO. L. CHRISTIAN. [SEAL.]"

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G. WATT TAYLOR
*against*
COMMONWEALTH OF VIRGINIA.

*Bill of Exceptions No. 3.*

Be it remembered, that on the trial of this cause, after the testimony had been closed on both sides, the defendant Commonwealth asked the Court to instruct the jury in the words and figures following, to wit:

"3.

The Court instructs the jury that, in this case, the genuineness and legality of the coupons in issue must be proved by competent legal evidence, and that the mere belief of the witnesses for petitioner that the said coupons are genuine and legal, however strong that belief may be on their part, will not suffice; but the petitioner must produce facts before the jury which will satisfy them that the coupons in issue are genuine and legal."

"4.

The Court further instructs the jury that, by the 115th Section of the Assessment Act of the General Assembly of Virginia, approved April 22, 1882, all taxes assessed by that act upon licenses are required to be paid in lawful money of the United States before the person applying for said license shall be entitled to receive the same, and if the jury shall believe from the evidence that the coupons tendered by the petitioner were offered by him in payment of a license tax, then they are *not legally receivable* in payment of said tax, and they must find for the defendant."

But the Court refused to give said instructions to the jury, to which ruling of the Court the Commonwealth excepted, and prays that her bill of exceptions may be signed, sealed and made part of the record.

GEO. L. CHRISTIAN. [SEAL.]"

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G. WATT TAYLOR
*against*
COMMONWEALTH OF VIRGINIA.

*Bill of Exceptions No. 4.*

Be it remembered, that after the testimony had been closed in this cause, the jury retired and brought in a verdict in the words and figures following, to wit: "We, the jury, find for the Petitioner upon the issues joined. And we also find that the Coupons mentioned in the exhibit filed with the Petition, and presented to us by the Court, to wit: the five coupons for $30 each, numbered 1457, 17,696, 17,735, 7641, 8810, are genuine legal coupons, legally receivable for all taxes, debts, demands, and dues, due the Commonwealth of Virginia.

"T. T. MAYO."

And thereupon the attorney for the Commonwealth moved the Court to set aside the verdict, upon the ground that it was contrary to the law and evidence, but the Court overruled the motion, to which action of the Court in overruling said motion the Commonwealth excepts, and tenders this her bill of exceptions, which was received, signed and sealed by the Court, and ordered to he made a part of the record. And thereupon, on the motion of the Commonwealth, the Court certifies that in addition to the evidence certified in Bills Nos. 1 and 2, taken during the progress of this trial, and here referred to as parts of this certificate, the petitioner to further maintain the issue upon his part, introduced S. G. Tinsley, who testified as follows:

That he was Assistant Treasurer of the City of Richmond; that he had been such about nine years; that his duty was to collect the taxes due the State in the City of Richmond; that he performed this service with the aid of three clerks; that coupons have been used in the payment of taxes for about the past eight years; that he had made a calculation lately in connection with Mr. Shakelford, and over two millions

of coupons had passed through his hand, being paid in at his office ; except once or twice, when he was sick. He always carried the coupons himself to the Second Auditor's office, where they were examimed and pronounced good, and he got a warrant for the amount with which he was credited; that Mr. Shackelford examined all the coupons paid in by him, except upon not more than half a dozen occasions, when they were examined by Mr. Morrison or Mr. Henry. At first, parties were dot required to endorse their names on the back of the coupons. About three years ago the Legislature required persons paying in coupons to endorse their names and date of payment on coupons.

The coupons exhibited before the jury in this case are genuine, as far as I know; are exactly like all the others I have received. I would not have the slightest hesitation in receiving them ; looking at the paper, work, marks, and their general appearance, they are, in my opinion, genuine. This opinion is based on having seen and handled other coupons as he has described. He has seen over two millions. He did not know what was the fate of the coupons after paid in; that he had sent a letter to the Committee of the Legislature investigating the Auditor's office; that is was reported by that committee that ninety-one thousand coupons were missing, and that of the two millions paid in by him, from a statement furnished him by the committee, he understood that sixty-three thousand dollars of coupons were missing and unaccounted for in the Second Auditor's office after they had been paid in by him; that less than seventy-five dollars' worth paid by him were found unstamped from oversight on his part ; that he had paid in many coupons received from foreign bondholders not endorsed, as the law did not require it. He knows of nothing to prevent unmarked coupons from being put on the market, and he could not say whether the coupons have ever been duplicated. Of the amount paid in by him not a single one had ever been doubted, or refused to be received. That the coupons in issue here were tendered to him for a license.

And this being all the evidence introduced on the part of the petitioner, the Commonwealth, to maintain the issue on her part, introduced W. N. Yewman, who testified that he had been, for the greater part of ten years, connected with the Treasurer's office, beginning when R. M. T. Hunter was Treasurer; that he was familiar with the conduct and management of the Treasurer's office, as well as the Second Auditor's office, that adjoined it, and with which he had official business connection; that there are two characters of registers, one for the bonds created by the act of 1870–71, the other the register of coupons that was not established until 1879; that he thought he himself had suggested the necessity for the coupon register, and that up to the establishment of the coupon register in 1879 he knew of no means to prevent the replacing on the market of the coupons, except the fidelity

of the officers themselves; that necessarily much of the business of both offices was confided to clerks, and the Second Auditor's office was more or less exposed, as stated by Gen'l Rogers, during the examination made by the committee referred to; that he knew of no means up to the act of 1879 to protect entirely the repetition by use of the coupons; that he had examined the coupon register in conjunction with Mr. Shackelford, and found that coupons corresponding in number and date with the coupons in issue here had not been received. The bond register contains the number of each bond and the name of the person to whom it was delivered; the coupon register contains columns for the entry of each coupon as it is received. It is manifest that coupons corresponding in number and date with the coupons in issue have never been paid or registered, and that he would take the coupons now before the jury, if offered to him as tax-collector. He had never heard of a duplicate coupon, or a forged coupon, although he had heard of coupons that were received before they were due, and of missing and uncancelled coupons.

The Commonwealth then introduced William E. Simons, who testified that he was now a bookbinder, but for two years he had carried on the business of lithographing, and was familiar with the processes by which bonds and coupons were engraved; that the original plates, or dies, were elaborate and expensive, but that it was easy and inexpensive to transfer the impression, and he believed that he could copy the coupon that he held in his hand so accurately that it would be difficult to detect, except by the original engravers. He said he was not personally familiar with, but had often read and heard of, electrotypes and electroplates, by which, through the agency of electricity and chemicals, the impression from plates and dies were easily transfered to softer metals; that he knew through the press that United States bank notes, engraved in the Bureau of Engraving and Printing, had been counterfeited so that even expert bankers and brokers had been unable to detect them; that there were other dangerous sources of counterfeiting, and among them was photography, that had reached such perfection as to imitate accurately. To get a perfect copy of an original engraved note it will have to be re-engraved, and bank notes otherwise copied could be easily detected; that to reproduce a bank note by re-engraving would require a fine engraver, skilled in his art, and the use of costly and expensive machinery. Re-engraving requires more time and expense than the original engraving. These coupons could only be counterfeited accurately by re-engraving. There are only three companies in the United States that can engrave and print bond and coupons. He believed that the engraving of these coupons is the work of the National Bank Note Company; the work is well done and is a good piece of work of its kind; have no doubt that these coupons were genuine, and have never heard of forged coupons.

And then the Commonwealth introduced R. W. N. Noland, who testified that he had been a clerk in the Treasurer's office of the State since 1st of January, 1880; that as such clerk he became familiar with the details and management of the Second Auditor's office; that he was frequently called on by the examining committee, composed of Messrs. Lovenstein, Turner and Cross to aid them when difficulties arose, and when the list from the Second Auditor's office was sent over to his office for new bonds or warrants, he frequently found that Peeler coupons, non-tax receivable, had been received in lieu of tax receivable coupons; that he found other coupons uncancelled, others received before due, others missing and unaccounted for, and still other coupons without the number of the bond thereon, and referred to pages 69 and 68 of the report of the committee to show instances thereof; that by reason of the laxity of the law up to 1879, he knew of no means by which it were possible to prevent these things from occurring, except the honesty of the officials; that the fact that some unnumbered coupons had been found, led him to conclude that the work of the American Bank Note Company was not perfect, and he knew of no way positively to identify coupons as genuine, as they were not signed by the treasurer, but mere facsimiles thereof were impressed thereon; that this was not the case with the bonds *itself*, as they were signed by the treasurer, and were also stamped; that he knew these were coupons corresponding in number with the bonds, but he could not state that these were the true, genuine coupons, nor could anyone, after they were detached from the bonds; that there were only several coupons with no face number upon them, and there were not many Peeler coupons received for tax-receivable coupons—perhaps one hundred. The coupons are like those which he was accustomed to handling, he would receive them if presented to him, he thought that since the introduction of the coupon register very little suspicion could attach to any coupon if the officers did their duty and were faithful. He would be just as certain of the genuineness of these coupons as of any so issued and handled, and he thought the whole coupon system was vicious and he was opposed to coupons altogether, as he thought it was impossible to protect the Government perfectly.

And further to maintain the issue upon her part, the Commonwealth offered as evidence "House Document No. 2," being the report of Special Committee, W. H. Turner, William Lovenstein and Thomas Cross, appointed by the House of Delegates to make an examination of the books and valuable papers of the Second Auditor's office, and of the general condition of the same, reported and returned 21st September, 1881, with the tabular statements and vouchers filed therewith, covering three hundred and three pages in print, in the words and figures follow-

ing, to wit (which is hereto annexed as part of this record, by direction of counsel, instead of being copied out).

And the Court certifies that the evidence, as set out, and referred to, in this bill of exceptions, and that marked No. 2, was all adduced on the trial of this cause.

GEO. L. CHRISTIAN. [SEAL.]"

A transcript from the record.

(Teste.)

ANDREW JINCKINS, *Clerk.*

# The Case of Tenessee vs. Sneed.

It is a very great misconception of the case of Tenessee *v.* Sneed to suppose, as many do, that it decides that a State may abolish the writ of mandamus where a creditor was entitled to it by his contract and substitute for it the remedial proceedings provided by the laws of Tenessee, which were under consideration in that case. The case of Sneed *v.* Tenessee presented no case of the abolition of a remedy to which the creditor was entitled and the substitution of another remedy in its place. The facts of the case were as follows: The contract to receive the notes in payment of taxes was made in 1838. The Supreme Court of the State of Tenessee decided in the case that no suit by mandamus against the officers of the State could be entertained under the laws of Tenessee in 1838, when the contract was made. That no such suit could be maintained until 1855, seventeen years after the contract was made, when an act was passed authorizing such a proceeding, but that this act was repealed, and the right to sue under it taken away in 1865.

Now, let it be observed that the rule of this Court by which it is established that it ascertains what are the laws of each State by consulting the decisions of the highest Court of that State, compelled it to accept for truth the decision of the Supreme Court of Tenessee, that when the contract was made, the creditor acquired no right to the writ of mandamus, as it was not then an existing remedy in the State of Tenessee. Consequently, Mr. Justice Hunt says at p. 73, in delivering the opinion of the Court: "*The question discussed by Mr. Justice Swayne in Walker* v. *Whitehead* (16 *Wall.*, 314), *of the preservation of the laws in existence at the making of the contract, is not before us. The claim is of a subsequent injury to the contract.*"

The decision is therefore expressly placed upon the ground that the case did not involve any question relative to the abolition of one remedy to which the creditor's contract entitled him, and the substitution of another. If the act complained of in Tenessee *v.* Sneed had simply provided that no holder of the notes in question should resort to the writ of mandamus to compel the officers of the State to receive them in payment of taxes—if this had been the entire scope of the act, no note

holder could have complained of it, because it would not have affected any right that he had. He had no right to the writ of mandamus. When the State, by the act of 1855, permitted him to use it, this was a grant without consideration, a mere license which she could revoke at her pleasure. The case therefore is wholly aside from any questions relating to the right of a State to abolish one remedy that a creditor is by his contract entitled to, upon substituting another equally good. No facts involving any such question were before the Court. The only provision of the Tenessee law of which the note holders could complain was that provision which forbade the collectors to receive the notes in payment of taxes which she had agreed that they should receive. Had the act or acts omitted this provision, there would have been nothing in them of which note holders could rightfully complain.

Now, as no question relating to the right of a State to abolish a remedy in existence when the contract was made was involved in the case, it presents the single, naked question whether, after a State has contracted that her officers shall receive notes in payment of taxes, she may enact that they shall not receive them. There is not a feature in the case by which it can be distinguished from the preceding cases of *Woodruff* v. *Trapnell*, *Furman* v. *Nicoll*, *State* v. *Stoll*, *and Hartman* v. *Greenhow*. Those cases had decided that where the State contracted that her officers should receive notes in payment of taxes she could not afterwards forbid them so to receive them. That was the simple issue presented in them, and that was the simple issue presented in *Tenessee* v. *Sneed*. Now, if Tenessee *v.* Sneed is to be allowed to stand, then the other cases must be held to be overruled. Which shall be done? Shall the other cases, running through a long series of years, cases which had come to be thought landmarks in the law, be declared to be overruled, or shall it be said that *Tenessee* v. *Sneed* must be abandoned?

It is hard to view this state of facts otherwise than as shameful.

1st. That the Constitution of the United States forbids a State to impair the obligation of a contract.

2d. That the decisions of this Court make all remedies for enforcing a contract in existence where it is made a part of the contract.

3rd. That the prohibition against a State impairing the ob-

ligation of a contract extends, by the decisions of this Court, to the contracts of the State herself, and to the remedies for enforcing them.

4th. That with all this declared to and believed by the world to be the law of the United States, a man with money lends his money to a State, she agreeing with him when she borrows it that all the foregoing is to be the law for the future and to govern her then transaction with him, and,

5th. That after the State has obtained possession of his money under these circumstances, she shall be permitted to retain his money and give him back no part of it, under the false pretence that her necessities require her to keep it, and that she should be permitted to retain it through and by virtue of laws made by herself that on their face pretend to be laws intended to give him what he contracted that he should get, but which are, obviously, in reality, laws which will keep from him every part of what he contracted that he should get.

If this is right in States, what is wrong in individuals?

If, after a State has voluntarily placed herself under the control of this Court, she shall be permitted by it to play this confidence game through—if she is to be permitted to make herself, in the eyes of her citizens, the supreme exemplar of that person who can most successfully cheat but yet retain position as one to be respected and honored, what is the Court to expect of the citizen himself? If this is to be allowed, the Court may put it down to its limited jurisdiction that its entire time is not consumed in sentencing the citizens of that State to the Penitentiary.

WM. L. ROYALL,
*For Plaintiff in Error.*

OFFICE SUPREME COURT U.S.
FILED
JAMES H. MCKENNEY

1769

# Supreme Court of the United States.

ANDREW ANTONI

*vs.*

S. C. GREENHOW.

*No. 845.*

## Brief in Reply to that filed by the Attorney-General of Virginia.

W. L. ROYALL,

*For Plaintiff in Error.*

C. G. BURGOYNE, Printer, Law Telephone 587, 57, 59 & 61 Park st., [Five Points], N. Y.

# SUPREME COURT OF THE UNITED STATES.

ANDREW ANTONI

vs.

S. C. GREENHOW.

No. 845.

## Brief in reply to that filed by the Attorney-General of Virginia.

The first proposition of the Attorney-General is, with reference to the Virginia Act of April 7, 1882, that

"The remedy by mandamus was not really abolished by the Virginia Act now under consideration; the proceedings under it were somewhat modified, but there was left the coupon-holder a plain adequate and complete remedy. It is true that the Constitution of the State (Article VI, section 2), confers the right of jurisdiction in mandamus originally on the Supreme Court of Appeals of the State. But the Constitution was incomplete in itself, and it was necessary for the General Assembly to prescribe the manner and the extent of this remedy."

The action of the Legislature, however, as it stood at the time of issuing the bonds, was no less explicit and conclusive of the contract than the Constitution itself.

The Constitutional provision was as follows:

"The Supreme Court of Appeals shall consist of five Judges, any three of whom may hold a Court. It shall have appellate jurisdiction only, excepting cases of *habeas corpus*, *mandamus*, and prohibition.

It shall not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator; or concerning a mill, roadway, ferry, or landing; or of the right of a corporation or of a county to levy tolls or taxes; and except in cases of *habeas corpus*, *mandamus*, and prohibition, or the constitutionality of a law: *Provided*, that the assent of a majority of the Judges elected to the Court shall be required in order to declare any law null and void by reason of its repugnance to the Federal Constitution or to the Constitution of this State."

Constitution of 1870, Art. VI., Sec. 2.

The law at that time stood as follows:

"Sec. 4. The said Supreme Court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and prohibition to the Circuit and Corporation Courts, and to the Hustings Court and the Chancery Court of the City of Richmond. and in all other cases in which it may be necessary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the Common Law. The practice and proceedings upon such writs shall be governed and regulated, in all cases, by the *principles* and practice now prevailing in respect to writs of *mandamus* and prohibition, respectively."

Virginia Laws, vol. 35, page 219, Act of June 23, 1870.

The right to have this writ, and to have it from the Supreme Court, and as a writ of original jurisdiction, was certainly an integral feature of the contract, provided the right itself possessed sufficient value to become a feature of the contract.

What is the true force and value of this right has by judicial judgment been excellently well defined:

"The writs of mandamus, quo warranto and habeas corpus are referred to as a convenient and usual means of making out the limits of jurisdiction intended for the Supreme Court. In legal parlance, the writ or form of action is allowed to personate

and stand for the jurisdiction to which it relates, to avoid inconvenient particularization. It is in this sense that the terms are here used. Such writs were then in common use, and furnished the common forms of expression for conveying the sense thus intended by this section. To separate the expression 'shall always have power to issue writs,' &c., from the context might create a doubt whether the conservation of the writ or the extent of the powers of the Supreme Court was the object in view, but, read by the context, it is clear that the technical value of the writs as remedial means, was not the subject of consideration; *but substantial rights, to be protected by lodging certain judicial powers in the Supreme Court, was the single end contemplated.*"

McKenzie vs. Alexander, 2 S. C., 86.

Indeed, this hardly is denied. The pretense is that a substitute, equally expeditious and effective, is presented. The ready answer is that the right is one of kind, as well as of degree. It is wholly untrue, however, as mere matter of degree.

This Court is asked to decide that the plaintiff is as well off since the passage of this statute as before, or so nearly as well off that the difference does not amount to an infraction of the terms on which the loan was made. This position is taken, in the Court of Appeals of Virginia, by that wing of the Court which favored refusing the writ. The ground on which it is put is the same as that suggested on the argument by Chief Justice Waite and Mr. Justice Miller that, "the proceeding is to determine whether "it be genuine or not, and *would seem to be* as ex- "peditious and effective as the proceeding by man- "damus where the same matter may be put in "issue."

This *seeming* is precisely what will not bear investigation. If the Legislature, after determining to send the coupon holder to the courts, had author-

ized him to resort in the first instance to the Court of last resort, and made proceedings in that court as expeditious and effective as in cases of mandamus, there would be ground for the assertion. Instead of this he is sent to the County Court, from which an appeal is expressly given to the Circuit Court and thence to the Court of Appeals. If he succeeded in the Court of Appeals, that Court can only send its judgment back for execution by the County Court. Certain it is the coupon holder is deprived of his right to resort in the first instance to the Court of Appeals and have that Court directly issue the writ. The results of the alternative provided are within judicial knowledge. This Court is asked, upon that knowledge, to solemnly pronounce that those results are immaterial to the value of the contract, that this method is as "expeditious and effective" as the other. Can any Court do this?

Complaint as to this change by no means stops with this statement of delay, expense and inconveniences The substitute is open to a graver charge. If the tax-payer went to the Supreme Court, under the former statute, he might suffer delay and expense, but he could do as he pleased about the payment of his taxes in the meantime. He could pay them or take the consequences, as he chose. He might, if he chose, rely on the collector's fear of the penalties of trespass for protection against unwarranted collection. Perhaps he could generally do this with success. Certainly this liberty of choice, to use his own funds as himself might choose, was a material feature of his right.

The act withdrawing the mandamus changed all this. When this act of April 7, 1882, was passed, there remained no jurisdiction under which these

coupons could in any manner gain a recognized validity except that vested by the act of Jan. 14, 1882. That act requires pre-payment as the necessary forerunner or condition precedent of any suit brought under it. Here is a new, distinct, emphatic feature. Before this, the taxpayer could maintain a suit to determine whether or no he was required to pay. Now he is required to pay before he can bring suit. No answer to this is found in the comparative inconvenience of the methods.

Nor is there any parallel to this in the suggestion that the Government of the United States requires prepayment of its revenues, and leaves the taxpayer to sue. So do the State, for that matter, and there the parallel ends. It does not touch a case of contract like that between the borrower and the lender in this case. If the State has reason to distrust the medium in which payment is offered to it of the taxes, it may require the taxpayer to pay in an unquestioned medium or suffer his goods to be taken in distraint. So far it may go, no further. What it here seeks is to make use of this constraint for a collateral purpose to say as to a certain class of its own obligations that payment of taxes shall be a condition precedent to suit upon those obligations. An all-sufficient answer is that it is not so nominated in the bond. Suppose this State, for instance, when gold and legal tender notes were of a different value, had passed a law that inasmuch as there might be some counterfeits of notes, therefore in every case where legal tender notes were offered, taxes must be paid in gold, and *then* the taxpayer might sue, and then if he should prove the offered notes were genuine, the State would take the notes and give him back his gold, that is, if they then

had it, he paying costs meantime! What would have been the fate of that enactment in this Court? Would this proceeding, as contrasted with mandamus, be pronounced within the contract made by the United States with those to whom the notes were issued for their blood. The standing of the note-holder would have arisen from precisely such a contract as that upon which this State has put forth its coupons. Yet with this difference, that to enforce contracts made by States is the specific duty of this Court.

The opinion of the Court in State *ex rel.* Douglas and Jackson vs. Galliard, 11 South Carolina, 309, does not at all turn upon the comparative convenience of the substituted method of recovery. That case goes on the ground that the writ of mandamus was not, in South Carolina, at all within the implied contract with the lender. This mainly for the alleged reason that this implied agreement included only remedies of a strictly compensatory nature and did not extend to remedies of a peremptory character. The Court, however, takes occasion to remark that if the statute passed on had encroached upon the Constitutional powers of the Court, the Court, in turn, would have summarily disregarded the statute.

It is noteworthy that in this case the right to a direct issue of the writ of mandamus from the Supreme Court did not rest on an express constitutional provision, or even on express statute, but solely on the usage of the common law. It was not until *after* the obligations were put forth that the constitutional provision was enacted. Even under these circumstances the Court was not unanimous.

The following is from the opinion of Chief Justice Willard:

"All the authorities agree that mandamus is not a writ of right, but may, in the exercise of a sound discretion, be refused on the ground of public convenience."

(State ex. rel., Shiver vs. Comp. Genl., 4 S. C., 185).

"The limits of that discretion do not appear to be well defined, but it is clear that on general principles it is competent for the Legislature to define the condition on which it shall be granted or withheld consistently with the nature of the writ as resting in sound discretion. As was said in Melver vs. State (2 S. C., i), it is now regarded as an ordinary remedy for the relator, in the cases where properly issuable, modifying to some extent the view that was originally taken of it."

Mr. Justice McIver, in a separate concurring opinion, used the following language:

"I concur in the conclusions reached in this case, but desire to state, very briefly, my reasons.

"As to the first question, discussed by the Chief Justice, viz., whether this Court has been deprived of the power to issue a writ of mandamus, in a case *of this kind*, by virtue of the provisions of an act entitled, 'An Act to facilitate the collection of taxes," approved December 24, 1878, if it were *res integra, I should feel compelled to dissent*, but I regard the question settled by the case of the State vs. County Treasurer (4 S. C. Rep., 520), *I am bound to yield my opinion to this express adjudication*, which *until it is reversed*, is as much binding upon me as if I agreed to every proposition which it announced."

"If the General Assembly has the power to deprive the Court of its right to issue the writ of mandamus in one particular case, no reason can possibly be suggested why it may not do so in any other case, or in all cases; and if so, then the result would be that the Court would be entirely stripped of one of the powers expressly granted to it by the Constitution. Such a result surely cannot be brought about by an act of the General Assembly."

A powerful dissenting opinion in this case by

Chief-Justice Moses is also well worthy the attention of this Court. I extract from it but a paragraph:

"But it is said that, notwithstanding the general grant of power in regard to this writ, the Legislature may, nevertheless, determine in what cases, and under what circumstances it may issue. This concedes an unlimited control to the Legislature of the whole judicial magistracy of the State, which, in in the end, might be so exercised as to suppress its entire authority. *If it can declare in what cases a particular form of action shall be a remedy for an alleged complaint, and ignore its application to other cases, in which, at the adoption of the constitution it was employed as a medium through whish a wrong was to be redressed, may it not step by step disarm the Courts of all their authority, and at last leave it but a tribunal to carry out the behests and mandates of the legislative will?*"

Contrast with these heterogeneous opinions the well considered judgment of the Court of Appeals of New Jersey in the case of Rahway vs. Munday, XLIV. N. J. Law Rep., 418.

"But it was further urged in opposition to this judgment in the Court below, that the writ of mandamus is not, in a constitutional sense, 'a remedy 'for enforcing a contract,' and tbat if it be such remedy it is a discretionary writ, and finally, that the power of taxation confided to a municipal corporation could, unless in certain exceptional cases, be withdrawn or modified at the pleasure of the Legislature.

"The proposition that the writ in question is not a remedy for the enforcing a contract is, it seems to me, plainly inadmissible. It is true that it is not one of the usual methods for that end, but *it is one of the extraordinary instrumentalities* If a judgment should be obtained in an inferior Court, and such Court should refuse, without legal reason, to issue an execution upon it, the mandamus compelling such action would be as much a remedy for enforcing such contract as would be either the judgment or final process. And so in many other cases which might be enumerated. That a municipal corporation owing a debt will, under common circumstances, be compelled by the use of this power to procure

the funds to defray such debt, is a well-known procedure, and in such instances I see no reason for the assertion that this writ is not strictly a remedy for the enforcement of an agreement. The contention is not countenanced by authority and is not sustainable. * * * * *

"It is believed no precedent can be found of Courts, upon a proper application, refusing to require an officer to discharge such a duty, so specific and remedial, with regard to a purely private right, as this."

It cannot be said in reply that the case of Douglas Jackson vs. Galliard is of superior authority as having been affirmed by this Court. This Court divided equally on the question of affirmance, and so the decree below stands simply not reversed. In any case, as has been shown, it is still clearly distinguishable from the case at bar.

The case of Tennessee vs. Sneed is likewise clearly distinguishable from the case at bar in this—that this whole question of this alleged legislative right to take away the laws in force at the time of the making of the contract was absent from that case. This is, however, fully discussed in the brief of Dillon & Swayne.

The most injurious feature of the act of January 14th, 1882, is the provision which forbids collectors of taxes to receive such coupons as are really genuine. Now why is this provision necessary to legislation regulating the remedies that pertain to a contract? If this act provided simply and only that when there is litigation concerning these coupons, the litigation should be according to the provisions of the act, it might be that no coupon holder would object to that. For, the officer who refused what turned out ultimately to be a genuine coupon would have done so at his own proper peril. At the end of the litigation he would have had to pay the costs

of the litigation which he had wrongfully put the coupon holder to, and he would have made himself responsible for whatever loss or damage might have accrued to any person whatever. With this as the state of the law, officers would have been very careful about refusing genuine coupons. None would have been refused except such as there was good reason to suppose to be spurious, and as, by making a tender of that which was really, in point of fact, a genuine coupon, a taxpayer would have done his entire duty; taxpayers would always have purchased coupons so long as they could be purchased at a discount.

But, since the act of Jan. 14th, the collector of taxes must refuse a coupon whether it be genuine or whether it be not genuine, and the holder of the coupon must become plaintiff in a suit; and though, at the end of the suit, it shall turn out that the coupon holder was in the right all the time, yet he must bear all the costs of the proceedings ,and although it shall turn out that the collector of taxes was in the wrong all the time, yet he bears no costs —suffers no penalty for his wrongful act, and goes out of Court in triumph, although his action had possibly been malicious throughout.

No taxpayer will purchase a coupon from a bondholder while this is the case. After he has once paid his taxes in money he will dismiss the subject from his mind. The interests involved are too trifling for him to concern himself with a harrassing lawsuit to recover that money back. All that he could make by it would be the difference between his tax, which tax is very small, and the price he paid for the coupon.

It might, therefore, be conceded by the holders of

Virginia's bonds that she might exercise any control that she thought proper over proceedings before her courts, if she did not accompany that control with injunctions to her officers to refuse her own coupons. How this injunction is at all essential to her regulating procedure in her own courts it is hard to understand. It is only necessary where the real purpose is to accomplish another object under the false pretense of regulating the procedure in her courts. It is in no wise necessary to a scheme honestly intended to be a regulation of procedure. It is absolutely necessary only where the legislation is intended to accomplish one thing under the false pretense of being intended to accomplish another.

If the state of Virginia is really seeking to protect herself against spurious coupons, the scheme of the legislation under review is not the appropriate course of procedure looking to that end. The proper way to secure protection is to pay her coupons at her treasury, as she has agreed to do. Then, by having an expert there, to examine each coupon as it is presented, she can throw out each spurious one as it comes, and thus secure effectual protection. This is the course adopted by all banks, business institutions, and governments which wish honestly to comply with their engagements.

Mr. Justice Miller enquired, during the oral argument, in what respect the Act of January 14th changed the status of matters, as they existed before. He suggested that before the Act the collectors were under no obligations to swear that the coupons tendered were spurious, and they could answer the rule in each case, that they had refused, because the coupon tendered was not genuine.

This is true, but at the end of the trial, if it should

turn out that the coupon was genuine, the officer would all the time have been a wrongdoer, and he would be responsible for the costs, and for all injuries that had accrued to any one by his wrongful act.

In reference to the Act of April 7th,

It will not do to say that it cannot be supposed that the Courts of Virginia would trifle with the plaintiff's rights in the manner indicated by the addendum to this brief. If the State will pass laws to destroy the coupons, it cannot be doubted that she will fill her courts with Judges to make that law effectual. If the coupon-holder can be driven out of the Supreme Court of Appeals (which his contract gave hima right to go into in the first instance), and compelled to commence his proceedings in a lower Court, he may be kept the victim of a game of battledore and shuttlecock indefinitely, The lower Court, after waiting indefinitely will decide against him. The higher Court, after holding his case for an indefinite time, will reverse the judgment and send the case back. The lower Court will again decide against him, and the higher Court will again reverse the judgment. Thus he may be kept going backward and forward until in very despair he will fund his bond, and take what the State chooses to give him. This process may be expanded indefinitely by making successive Courts through all of whicn he must go.

Wm. L. Royall,
For Plaintiff in Error.

OFFICE SUPREME COURT U.S.
JAN 23 1933

17769

# Supreme Court of the United States,

## No. 845.

ANDREW ANTONI, Plaintiff in Error,

vs.

SAMUEL C. GREENHOW, Treasurer of City of Richmond.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

# Supreme Court of the United States,

## No. 845.

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ANDREW ANTONI, PLAINTIFF IN ERROR,

VS.

SAMUEL C. GREENHOW, TREASURER OF CITY OF RICHMOND.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

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The Commonwealth of Virginia desires to submit the following views in addition to those presented before the Supreme Court of the State of Virginia, and which accompany this brief. The petition for *mandamus* was rejected by the Supreme Court of Virginia, and it is submitted that they were well warranted in doing so.

The constitutionality of an act of the General Assembly of Virginia, found on page 10, chapter 7, Acts 1881–2, to prevent frauds upon the Commonwealth, and the holders of her securities in the collection and disbursement of revenues was judicially drawn in question. It is hardly necessary to remind this court that an act of the General Assembly will only be pronounced void, when it clearly, and beyond all doubt, is in violation of the Constitution. (Fletcher *vs.* Peck, 6 Cranch., page 87; Cooley on Const. Lim. and cases cited, page 182—side p.; Sharpe *vs.* Robinson, 5 Gratt., pages 518, 642; and numerous other cases too unnecessary to be collated).

The real question raised in this case, is the power of state legislatures over the remedies in civil cases. We think it well settled that the Legislature may change the remedies, even though the new remedies be less convenient than the old, and less prompt and speedy. A right to a particular remedy is not a vested right; but every state has control of the remedies it offers its suitors, and may withdraw them entirely. (Cooley on Cont. Lim. page 361, marg., and note 3; Cooley on Cont. Lim., page 287, notes 1 and 2 of 4th edition; Potter Dwarris on Stat's and Const's, pages 471–3; Morse *vs.* Gould, 11th N. Y., pages 287, 201).

The remedy by *mandamus* was not really abolished by the Virginia act now under consideration; the proceedings under it were somewhat modified, but there was left the coupon-holder a plain, adequate, and complete remedy. It is true that the Constitution of the State (Article 6, section 2), confers the right of jurisdiction in *mandamus*, originally on the Supreme Court of Appeals of the State.

But the Constitution was incomplete in itself, and it was necessary for the General Assembly to prescribe the manner and the extent of this remedy. This was so held in the following cases: Barrett *vs.* Meredith, 10 Grattan, 650; Page *vs.* Clopton, 30 Grattan, 315. It is respectfully submitted that sections 1, 2, and 3 of the Virginia act referred to, chapter 7, page 10, 1881–2, gives as complete remedy as was allowed prior thereto by chapter 151 of the Code of Virginia 1873, page 1023, which was the only remedy by *mandamus* in existence when the coupons were issued under the funding act of 1871. The proceeding at that time by *mandamus* was according to the principles of common law. (See chapter 156, Code of Virginia 1873, section 4, page 1049.) The proceedings by common law are well known to the court. The Virginia act did not violate the obligation of the contract at all; indeed, it expressly recognizes it and only requires, by a particular remedy prescribed, that the coupon holder shall prove, identify, and verify his coupon to be genuine, and when that is done, such coupons are legally receivable for all taxes, debts, and demands due the Commonwealth. The reasons for this remedy are set forth in the preamble to the said act, and it is a well-established principle of law that the facts recited in the preamble to an act is evidence of the facts therein recited as the reasons for the passage of the act and the intention of the law-makers. (Cooley on Cont. Lim., 96 and 6 marg.; 4 Maule & S., 532; 1 Phillips Ev., 239, *et seq.*, and generally; Bouvier Law Dic., vol. 2, 359, preamble.)

The Virginia act is almost a literal transcript of the Tennessee act that was adjudicated to be valid by this court, in the case of the State of Tennessee *vs.* Sneed, 96 U. S. R., 6 Otto, page 69.

In that case your honorable court held that the Tennessee act was constitutional, although the bank notes of the State bank were declared to be tax-receivable, and had all the indicia of a contract that attaches to the coupons that were issued under the funding acts of 1871 in Virginia. So that this cause resolves itself into the following questions that involve the constitutionality of two acts of the General Assembly of Virginia:

First. An act of January 14th, 1882, entitled "An act to prevent frauds upon the Commonwealth," &c.

Second. An act approved April 7th, 1882, entitled "An act to amend and re-enact section 4, chapter 156 of the Code of Virginia of 1873, in relation to *mandamus*," &c.

By the last-named act the remedy by the writ of *mandamus*, in cases like the present, is taken away. These acts are assailed upon the ground that they are in conflict with the constitutional provision prohibiting all State legislation which impairs the obligation of a contract.

I have endeavored to show that the obligation of the contract by the Virginia act has been in nowise impaired. The court below composed of a bench elected twelve years ago—all gentlemen of large legal experience before they reached the bench, and since their elevation thereto, who have proven themselves to be in every way fully qualified for the discharge of the judicial duties of that court—have sustained the validity of both of said acts; held that the said act, now the subject of judicial investigation, did not impair the obligation of the contract claimed to have been made by the State of Virginia with her public creditors; and they, therefore, denied the *mandamus* prayed for by the plaintiffs in error.

It is clear that if the court below was right in affirming the validity of *either* act, then its judgment from below must be affirmed by this court.

The purpose of this writ of error is believed to be, principally, to test the validity of the first of these acts, to-wit: the act entitled "An act to prevent frauds upon the Commonwealth," etc.

Even if the court below was wrong in affirming the validity of this act, its judgment must nevertheless be affirmed here, if it rightly sustained the act of April 7, 1882.

Dismissing, therefore, the consideration of the act of January 14, 1882, let us examine the act of April 7, 1882.

This act, as its title indicates, amends and re-enacts a section of a chapter of the Virginia Code. The chapter containing that section is a chapter entitled "OF THE COURT OF APPEALS," and is the chapter which defines the jurisdiction of that court in so far as its jurisdiction is definable by law.

The fourth section of this chapter, which is the section amended by the act of April 7, 1882, relates to its jurisdiction to issue writs of *mandamus*.

By the section, as it originally stood, the court had jurisdiction to issue this writ in all cases whatsoever in which its issue might be necessary to prevent a failure of justice and in which the writ might issue according to the principles of the common law.

The act of April 7, 1882, limits and restricts this jurisdiction as it existed under the section in its original form, forbidding the issue of the writ in "any case of the collection or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes" other than gold, silver, United States treasury notes, or national bank currency.

Thus this act of April 7, 1882, is simply an act limiting and restricting the original jurisdiction of the Court of Appeals in cases of *mandamus*.

That the Legislature has power under the Constitution of the State to prescribe and determine the original jurisdiction of the Court of Appeals in cases of *mandamus*, has always been the accepted law in the State of Virginia.

It is so declared in the case of Barret *vs.* Meredith, 10 Grattan, 650, and has never been denied.

It will be perceived that the act of April 7, 1882, does not purport or profess to abolish, absolutely, in all cases, the remedy by *mandamus* as a means of compelling collecting officers to accept coupons in payment of taxes. This was done by a later act, not in force at the time when the present suit was begun, and which, therefore, does not come under judgment in this cause.

The whole effect of the act of April 7, 1882, is *to deny to a particular court*—the Court of Appeals—the power to award this writ in such cases, leaving the jurisdiction of the subordinate courts, in such cases, unimpaired.

If this be the right construction of the act of April 7, 1882, then however clear it might have appeared that the collecting officer, in this case, was compellable by *mandamus*, to accept the coupon tendered, it was nevertheless not of its power to award the writ, and it was bound to deny the prayer of the petitioner.

The petitioner, conceding that he was entitled to a *mandamus*, applied for it to the wrong court—a court which had no jurisdic- to award it.

Again, under this view and construction of the act of April 7, 1882, no Federal question is presented by the record, to give to this court jurisdiction over this writ of error. Clearly, no Federal question is presented by the act of April 7, 1882.

Whether or not the Court of Appeals of Virginia, whose jurisdiction is to be determined by the Constitution and laws of Virginia, has jurisdiction to award the writ of *mandamus* in a particular case, is a question for that court alone—and its decision, whatever it might be, would be conclusive here.

The Court of Appeals, in sustaining the act of April 7, 1881, affirmed its want of jurisdiction to award the writ, and even were that decision erroneous—as on the views expressed it clearly is not—that decision could not be reviewed by the Supreme Court of the United States.

It is wholly immaterial whether or not the court below, in arriving at its judgment, gave an erroneous construction to the act of January 14, 1882, which I wholly deny.

The construction of that act was altogether unnecessary to the decision of the cause.

The judgment of the court below requires nothing to support it but the act of April 7, 1882; and so long as the validity of this act is maintained, it was going needlessly out of the way—either to affirm or disaffirm the act of January 14.

From the foregoing, it follows:

1. That the judgment below was right.

2. That if it was not right, it cannot be corrected or reviewed by the Supreme Court of the United States.

F. S. BLAIR,

*Attorney General of Virginia, for S. C. Greenhow, Treasurer, &c.*

19769

IN THE

# Supreme Court of the United States.

ANDREW ANTONI

vs.

SAMUEL C. GREENHOW, Treasurer, &c.

THE BRIEF AND ARGUMENT OF THE ATTORNEY-GENERAL OF VIRGINIA FOR THE RESPONDENT.

IN THE

# Supreme Court of the United States.

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ANDREW ANTONI

vs.

SAMUEL C. GREENHOW, Treasurer, &c.

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## THE BRIEF AND ARGUMENT OF THE ATTORNEY-GENERAL OF VIRGINIA FOR THE RESPONDENT.

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On the 20th day of March, 1882, Andrew Antoni, a tax-payer and citizen of the city of Richmond, Virginia, presented his petition to the honorable judges of the supreme court of appeals of Virginia, in which he represented that as such citizen and tax-payer he owes to the state of Virginia taxes to the amount of three dollars and fifteen cents; that he is the owner of property in said city, and that as such tax-payer, on that day, he had tendered to the said Samuel C. Greenhow, who was then, and is now, the treasurer of the city of Richmond, charged by law with the duty of collecting the taxes due to the state of Virginia in said city, a coupon for $3, which was due and past maturity, and which coupon he avers was cut from a bond of the state of Virginia, issued under the provisions of the act of the General Assembly of Virginia, passed March 30, 1871, found in Acts of 1870–71, chapter 282, page 378, and commonly known as the "funding bill," together with fifteen cents in lawful money of the United States, making in all $3 15 cents, in payment of the taxes aforesaid, due by him to the state of Virginia.

He complains that the said treasurer refused to receive the said coupon and money in discharge of the amount of the taxes due by him. He avers that the said coupon tendered by him was cut from a bond of the state of Virginia, issued under the provisions of the aforesaid act for $100, numbered 6,498, and that the same is coupon No. 21 of the coupons attached to said bond, and that the same is as follows, to-wit:

"Receivable at and after maturity, for all taxes, debts and demands due the state.

"The commonwealth of Virginia will pay the bearer three dollars interest due the 1st of January, 1882, on bond 6,498.

"GEORGE RYE,
"*Treasurer of the Commonwealth of Virginia.*

"Coupon No. 21."

The said Antoni further avers that the state of Virginia issued and put out her aforesaid bond, with aforesaid coupon attached thereto, and that she thereby entered into a contract with the person to whom she issued said bond, and with whoever might be the bearer of the said coupon, that she would receive the same in payment of taxes due to her at its face value, and that the refusal of the said treasurer injured and aggrieved the said petitioner; wherefore, he prayed that a writ of *mandamus nisi* might be issued to said treasurer, commanding him to receive from the said Antoni the coupon and money aforesaid, in full payment of the said taxes due by him to the state.

Upon that petition a rule was awarded against the said treasurer, returnable on the 30th day of March, 1882, which rule was duly executed on said treasurer, and who, by the attorney-general, made return thereto in the following words:

"Samuel C. Greenhow, treasurer of Richmond city, is ready to receive said coupons in payment of such taxes, debts and demands named in the petition of Andrew Antoni, as soon as they have been legally ascertained to be genuine, and the coupons which, by law, are actually receivable."

This is the form of return prescribed by act hereinafter named, and, of course, is a traverse of the allegations of petition.

But from abundance of caution he made the following additional return:

The respondent, Greenhow, treasurer, by way of other and further amendment of his return in this case, if under the return already made, the court should conclude that this defence cannot be made known, responds and says:

1. That this court has no jurisdiction to entertain the said petition for *mandamus*, because the act of 14th of January, 1882, give a plain, adequate, and complete remedy at law.

2. By chapter 44 of Code of 1873, the mode of procedure for claims against the commonwealth is prescribed, and that remedy is plain, adequate, and complete.

The remedy by *mandamus* is only granted by chapter 156, section 4, according to the principles of the common law and to prevent a failure of justice.

4. Because by an act of the General Assembly, approved March 7th, 1882, jurisdiction by *mandamus*, in cases of this character, is withdrawn by the General Assembly from this court.

5. By the Acts of 1874–5, page 253, no judgment or decree against the commonwealth shall be paid without a special appropriation therefor by law.

6. Because the said act of the 30th of March, 1871, is unconstitutional and void.

A. It violates the 10th section of the 1st article of the constitution of the United States.

B. It violates the 8th section of the 8th article of the constitution of Virginia.

C. It deprives subsequent Legislatures of their power and control over the collection and disbursement of the revenues of the state.

For these causes, in addition to the causes assigned in the general return, respondent prays that the prayer of the petition may not be granted for a peremptory *mandamus*, but that the petition be dismissed with costs for the respondent.

To this return the attorney for the petitioner demurred for this, that the said return was insufficient in law; in which demurrer the attorney-general for said treasurer joined, and thus the question is presented to the court, is the said petitioner entitled to a peremptory *mandamus* to compel the said treasurer to receive from the said Antoni the said coupons?

The General Assembly of Virginia, at its present session, passed an act known as chapter 7, "to prevent frauds upon the commonwealth and the holders of her securities, in the collection and disbursement of revenues," approved January 14, 1882, and is as follows:

Whereas bonds purporting to be the bonds of this commonwealth issued by authority of the act of March thirtieth, eighteen hundred and seventy-one, entitled an act to provide for the funding and payment of the public debt, and under the act of March twenty-eighth, eighteen hundred and seventy-nine, entitled an act to provide a plan of settlement of the public debt, are in existence without authority of law; and whereas other such bonds are in existence which are spurious, stolen, or forged, which bonds bear coupons in the similitude of genuine coupons,

receivable for all taxes, debts, and demands due the commonwealth; and whereas the coupons from such spurious, stolen, or forged bonds are received in payment of taxes, debts, and demands; and whereas genuine coupons from genuine bonds, after having been received in payment of taxes, debts, and demands, are fraudulently reissued and received more than once in such payments; and whereas such frauds on the rights of the holders of the aforesaid bonds impairs the contract made by the commonwealth with them, that the coupons thereon should be received in payment of all taxes, debts, and demands due the said commonwealth, and at the same time defrauds her out of her revenues; therefore, for the purpose of protecting the rights of said bondholders and of enforcing the said contract between them and the commonwealth, and of preventing frauds in the revenue of the same,

1. Be it enacted by the General Assembly of Virginia, That whenever any tax-payer, or his agent, shall tender to any person whose duty it is to collect or receive taxes, debts, or demands due the commonwealth, any papers or instruments in print, writing, or engraving, purporting to be coupons detached from bonds of the commonwealth issued under the act of eighteen hundred and seventy-one, entitled an act to fund the public debt, in payment of any such taxes, debts, and demands, the person to whom such papers are tendered, shall receive the same, giving the party tendering, a receipt, stating that he has received the same for the purpose of identification and verification.

2. He shall at the same time require such tax-payer to pay his taxes in coin, legal tender notes, or national bank bills, and upon payment, give him a receipt for the same. In case of refusal to pay, the taxes due shall be collected as all other delinquent taxes are collected.

3. He shall mark each paper as coupons so received, with the initials of the tax-payer from whom received, and the date of receipt, and shall deliver the same, securely sealed up, to the judge of the county court of the county, or hustings court of the city, in which such taxes, debts, or demands are payable. The tax-payer shall thereupon be at liberty to file his petition in said county court against the commonwealth. A summons to answer which petition shall be served on the commonwealth's attorney, who shall appear to and defend the same. The petition shall allege that he has tendered certain coupons in payment of his taxes, debts, and demands, and pray that a jury be impanneled to try the question as to whether they are genuine, legal coupons, which are legally receivable for taxes, debts, and demands. Upon this petition an issue shall be made in behalf of the commonwealth, which shall be tried by a jury, and either party shall have a right to exceptions on the trial, and of appeal to the circuit court and court of appeals. If it be finally decided in favor of the petitioner, that the coupons tendered by him are genuine, legal coupons, receivable for taxes, and so forth, then the judgment of the court shall be certified to the treasurer, who, upon receipt thereof, shall receive said coupons for taxes, and shall refund the money before then paid for his taxes by the tax-payer, out of the first money in the treasury, in preference to all other claims.

4. Whenever any tax-payer shall apply to any court in this commonwealth for a mandamus to compel any person authorized to receive or collect taxes, debts, or demands due the commonwealth, to receive coupons for taxes, it shall be the duty of such person to make return to said mandamus, that he is ready to receive said coupons in payment of

such taxes, debts, and demands as soon as they have been legally ascertained to be genuine, and the coupons which by law are actually receivable. Upon such return, the court before whom the application is made, shall require the petitioner to pay his taxes to the tax-collector of his county or city, or to the treasurer of the commonwealth; and upon filing the receipt for such taxes in such court, the said court shall direct the petitioner to file his coupons in such court, which shall then forward the same to the county court of the county, or hustings court of the city, where such taxes are payable, and direct said court to frame an issue between the petitioner, as plaintiff, and the commonwealth, as defendant, as to whether the coupons so tendered are genuine coupons, legally receivable for taxes. On the trial of the cause, the attorney for the commonwealth in the lower courts, and the attorney-general in the supreme court of appeals, shall appear for the commonwealth, and require proof of the genuineness and legality of the coupons in issue. Either party shall be entitled to exceptions, and an appeal to the circuit court and supreme court of appeals on the trial of this issue. If the decision be finally in favor of the petitioner, the mandamus shall issue requiring the coupons to be received for said taxes, and so forth, and they shall be so received; and on the certificate of such judgment, the treasurer of the commonwealth shall forthwith refund to the tax-payer the amount of currency or money before then paid by him for taxes, out of the first money in the treasury, in preference to all other claims.

5. This act shall be in force from its passage.

This case presents some questions of the first impression in this state, but I am not wholly without the aid of home adjudications to cast light on the subject matter by inference and analogy, and much aid is furnished by recourse to fundamental law and the decisions of other states. It will at once occur to the court, however, that the meagre time allotted me for its preparation will not at all comport with the dignity, gravity and novelty of this case. It is proper, at the very threshold of this argument to state that the act of the 14th of January, 1882, relied on by the commonwealth, neither repudiates or seeks to readjust or settle at a less amount than par, one stiver of the state debt, nor does it seek to exonerate the state from the payment of a single genuine coupon.

Against the writ I interpose and show the following causes why it should not be made mandatory, and the prayer of the petitioner granted:

1st. I interpose the jurisdictional objection, that this court has no cognizance of mandamus, as there exists an adequate and specific remedy at law in the ordinary forms of legal procedure, and that therefore from the very nature and origin of the writ of mandamus, no relief by it can be afforded. To sustain this view, I beg to refer to "High on Extraordinary Legal Remedies," chap. 1, sec. 15, top page 17, edition 1874. There it is stated that it results from the very nature and origin of the writ that it was introduced to afford relief only in extraordinary cases where the laws presented no adequate remedy; therefore one of

the first questions to be determined in all applications for the writ of mandamus, is the existence or non-existence of an adequate and specific remedy at law.

By 16th section, "Wherever an express remedy is afforded by statutes, plain and specific in its nature and fully adequate to redress the grievance complained of, mandamus will not lie."

Again: 17th section says: "If the existing remedy is adequate to place the injured party in the same position he occupied before the injury or omission of duty complained of, it will prevent the interposition of the courts by mandamus."

This authority is supported in the foot notes by an unbroken line of English and American decisions, including the case of King William Justices vs. Munday, 2d Leigh, page 165, marg., where the court unanimously held that mandamus never lies if there is another specific legal remedy for the party complaining. That was a case by mandamus to compel the county court of King William to levy a particular sum of money for county purposes. The court unanimously dismissed the mandamus, because a specific remedy was given by statute to recover the same by action of debt against the justices refusing to make the levy. The opinion of Carr, J., page 169, marg., is so pointed and decisive of my first objection, that I dispatch this point by asking the court's examination of the same.

Under this act, approved 14th January, 1882, and known as the "Act to prevent frauds upon the commonwealth, &c.," the 3d section thereof gives to the coupon holder a speedy, effective and most economic remedy for the enforcement of his coupon against the commonwealth, and if upon trial by the jury prescribed, the said coupon should be proven to be genuine, and such as by law is actually receivable, it is ordered that the holder be repaid.

Nowhere does that act conflict with section 10, article 1, constitution of the United States, and the fourteenth section of article 5, constitution of Virginia, which forbid the passage of "any law impairing the obligation of contracts. The act merely relates to, effects, and modifies the remedy for the enforcement of the collection of the coupons. The act itself is founded on reason, public policy, and above all, upon the self-preservation of the life of the commonwealth itself. If all the bonds and coupons uttered under the said funding bill of March 30, 1871, were genuine, real, and authentic, there could be no necessity for that act, but in the preamble of the said act, the General Assembly of Virginia have solemnly declared, and the governor of the commonwealth has approved the declaration, that bonds purporting to be the bonds of this state, issued by authority of the act of March 30, 1871, entitled an act to provide for the funding and payment of the public debt, as well

as under the act of March 28, 1879, entitled an act to provide a plan of settlement of the public debt of Virginia, *are in existence without authority of law;* and that other such bonds are in existence which are spurious, counterfeit, forged, stolen, and of false character, and which bonds bear spurious and fraudulent coupons, in the similitude of genuine coupons, receivable for all taxes, debts, and demands due the commonwealth; and that the said coupons from such spurious, stolen, and forged bonds are now being received by the state in payment of taxes, debts, and demands; and that genuine coupons, from genuine bonds, after having been *once* received in payment of taxes, debts, and demands, are frudulently reissued and received more than once in such payments; and that thus such frauds are perpetrated on the rights of the holders of the aforesaid bonds; that the false coupons thereon should not be received in payment of taxes, debts, and demands due the said commonwealth; that the said fraudulent coupons at the same time defraud the commonwealth out of her revenues.

Therefore, and for the purpose of protecting the rights of the said bondholders, both in their bonds and coupons, and of enforcing the contract between them and the commonwealth, and of preventing frauds against the revenue of the state, the act requires that the tax-payer who tenders to any collector of taxes of the commonwealth, any written, printed, or engraved paper or instrument purporting to be coupons, detached from bonds of the commonwealth, issued under the said funding act of 1871, shall be required to verify and identify the said coupons to be genuine and lawful.

The third section of said act prescribes a plain, adequate, and complete remedy at law for the said tax-payer or coupon-holder—a remedy of the most summary, speedy, and economic character is accorded to him. The coupon is received by the tax collector; the initials of the tax-payer endorsed thereon, and the receipt that is given to the said tax-payer is securely sealed up and delivered by said collector to the judge of the county court of the county or to the judge of the hustings court of the city in which such taxes are payable. The tax-payer is thereupon at liberty to file his petition in said court against the commonwealth. A summons issues thereon to answer the petition, which should be served on the commonwealth's attorney, who shall appear and defend the same. The petition in required to allege that the tax-payer has tendered certain coupons in payment of his taxes, and praying that a jury be impannelled to try the question whether the said coupons are genuine and legal and legally receivable for taxes; that upon this petition, an issue shall be made in behalf of the commonwealth, which shall be tried by a jury—either party having the right to exceptions on the trial, and to appeal to the circuit court and court of appeals; and if it be finally

decided in favor of the petitioner that the coupons tendered by him are genuine, legal coupons, receivable for taxes, then the judgment of the court shall be certified to the treasurer, who, upon the receipt thereof, shall receive said coupons for taxes, and shall refund the money paid before then (under the second section of this act) for his taxes by the tax-payer, out of the first money in the treasury in preference to all other claims.

We repeat with emphasis, that the act referred to nowhere infracts the contract rights of the coupon holder, but that it merely throws around the commonwealth an *ægis* for her own protection, and that of her bondholders, against the fraud, forgery, and double-funding processes of the unscrupulous.

It is hardly necessary to say that the income or revenue of a state received from her lands, property, and other subjects, constitute the only source from which her expenses can be derived, and that it is her sovereign right to control and regulate the collection and disbursement thereof, as in her sovereign power she may think will best subserve her own interests and that of her citizens. (See Moore case).

The next cause assigned is that the act known as the funding bill, approved March 30, 1871, is unconstitutional and void. I know that in the light of Antoni *vs.* Wright, 22 Grat., 833, Hartman *vs.* Greenhow, and other cases growing out of the same questions in Virginia, as well the case of Furman *vs.* Nichols, from Tennessee, reported in 8 Wall., and Woodruff *vs.* Trapnell, from Arkansas, which have been so happily commented on and explained by Judge Staples in Antoni *vs.* Wright, and shown not to militate against my present view of this case, it may seem but a waste of time before this court, with its present constitutional and legal convictions, for me to review this objection in this case. My convictions, however, are so fixed that I cannot refrain from presenting, for the consideration of the court, some additional views in that regard, in connection with the present bill. It was held by this court, in Antoni *vs.* Wright, that the receivability of the coupon for taxes was established by the Legislature by a contract with its creditors, and that the character of the receivability could not be destroyed by the same Legislature. Now, I beg to submit that the whole question hinges upon the character and effect of that contract. In Butler *vs.* Pennsylvania, 10 Howard, 416, Daniel, J., said: "The contracts designed to be protected by the tenth section of the first article of the federal constitution, are contracts by which perfect rights, certain definite, fixed, private rights of property are vested. These are clearly distinguishable from measures or engagements, adopted or undertaken by the body politic or state government, for the benefit of all and from the necessity of the case, and according to universal understanding, to

be varied or discontinued as the public may require." Again, Ibid, p. 489, Chief Justice Taney says: "The powers of sovereignty confided to the legislative body of a state are undoubtedly a trust committed to them, to be executed to the best of their judgment for the public good; and no Legislature can, by their own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body, unless they are authorized to do so by the constitution under which they are elected."

If all the elements of a great and growing commonwealth, with her possessions and resources, and the very life and existence of the state herself, are worthy of consideration, the foregoing words of wisdom, and those to follow now, must cause a pause and exact a calm investigation.

The same court says, on page 489, "it (meaning the Legislature) cannot abridge its own legislative power by making permanent and irrepealable contracts in reference to matters of public interest." The court fortifies this declaration by the following decisions of the supreme court of the United States: Earl Hartford *vs.* Hartford Bridge Company, 10 How., 517; Gosler *vs.* Corporation of Georgetown, 6 Wheat, 593; Ohio Life Insurance and Trust Company *vs.* Debolt, 16 How., 416.

The wisdom, justice, and necessity alike of the rule are vindicated by the great burthen by which that funding act has oppressed the state in its substance and impoverished the masses in spirit and heart as well as by the great wrong and injustice that have been perpetrated on the peeler bondholders by an unsparing discrimination against their equally meritorious state securities.

I deny that a sovereign state, organized upon the principle of "the greatest good to the greatest number," can abdicate to creditors the control and absorption of her finances, as such a course would leave her without the means of subsistence. The funding bill, in effect, would prostrate her educational system, would close the doors of her colleges and free schools, would destroy the efficiency of her elemosynary institutions, that are designed to dispense charity and relief to our unfortunate, afflicted citizens, and would deprive the state, even, of its ordinary machinery of government, and destroy its autonomy.

Judge Staples enunciated the same rule of action in his dissenting opinion in Antoni *vs.* Wright, 22 Grat., when he affirmed that "one Legislature cannot bind succeeding Legislatures and the public revenue in the manner attempted in the provisions of the funding act." The reasoning of the learned *dissentient* judge would seem to be unanswerable and to supersede the necessity of any further collation of authorities. Judge Robertson, in Burroughs *vs.* Peyton, 16 Grat., 470, declares to the same effect, when he says, "By the term contracts in that clause

(meaning the clause impairing the obligation of contracts), it is not meant to include the rights and interests growing out of the measures of public policy. Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired by them, those rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the Legislature to change the law thereafter as the public interest may from time appear to require."

From the high position occupied by Hon. Robert W. Hughes, judge of the United States district court for the Eastern district of Virginia, and who is well known as an able constitutional lawyer, I cannot forbear from refreshing the memory of the court with some of his views upon the constitutionality of the tax-receivable coupon feature of the funding act of 1871. In his letter of January the 6th, 1875, to the editor of the Staunton *Virginian*, he holds: "As early as the days of the *Magna Charta*, and down through succeeding centuries to the present time, notably in their war with the Stuarts, the English people have asserted the principle of the absolute power of each parliament over the revenues raised by taxation during its own term of existence. That right of parliament has been a fundamental canon of the constitutional law of England at all times; and is a cardinal principle of our American policy.

"The coupon feature of the funding act is repugnant to the cardinal doctrine on this subject, which has been held by the constitutional statesmen of England and America, since the principles of popular liberty have had advocates, defenders, or martyrs in either country. Whether any legislature of Virginia shall deem itself bound by it, is only a moral question for its own decision, and not a legal question for the decision of any court whatever. * * * * The tax-gathering coupon, the cut-worm of the revenues, appropriating them each year to itself with impertinent disdain of legislative authority, is a device of modern ingenuity to subject the legislature, in the exercise of its highest constitutional functions, to the power of the judiciary, and is at war with the cherished English and American principle of the mutual independence of the legislative, executive, and judicial departments of government. Any measure which brings these jurisdictions into conflict, and thrusts a court into colorable usurpation, is vicious in the last degree.

"The right of each legislature to control the revenues of the state during the period of its service, cannot, in my opinion, be taken away, either by prerogative or contract, or any other power or device, legisla-

tive, executive, or judicial. The revenues of a state derived from taxation, cannot be entailed by any legislature. * * * *

"The attempt of a legislature to obstruct the power of its successors over the revenues for a single year, or for thirty years in advance, is, in my judgment, *ultra vires*, and essentially null and void, nor can any action of such a body, designated to effect such a purpose, be validated by any court whatever in the land."

The foregoing reasoning clearly demonstrates that no civil obligation arises under said funding bill, that it confers no legal right on the coupon holder, and no corresponding legal duty on the commonwealth. It is but *nudum pactum*, and has no binding efficacy or force, and, therefore, the maxim applies in all its force, *ex nudo pacto non oritur actio.*

It may not be improper here to add that Thomas Jefferson, one of the framers of the constitution of the United States, in a letter addressed to James Madison, from Paris, dated 6th September, 1789, and found in the 3d volume of Jefferson's complete works, page 103, says: "The question whether one generation has a right to bind another seems never to have been started on this or the other side of the waters. Yet it is a question of much consequence, as not only to merit decision, but place also among the fundamental principles of every government. The course of reflection in which we are immersed here on the elementary principles of society has presented this question to my mind, and that no such obligation can be transmitted, I think, very capable of proof. I set out on the ground, which I suppose to be self-evident, that "The earth belongs in usufruct to the living, that the dead have neither powers nor rights over it." Page 104: "Then no generation can contract debts greater than may be paid during the course of its own existence. * * * * * When a whole generation dies, and another generation or society succeeds them, there is no superior who can give their territory to a third society, who may have lent money to their predecessors beyond their faculty of paying. The conclusion, then, is that neither the representatives of a nation, nor the whole nation itself assembled, can validly engage debts beyond what *they* may pay in their own time."

I deem the foregoing elaboration of the proposition pardonable, when I reflect that this argument is made in behalf of a state that (upon the authority of Ex-Governor Kemper, in his address to the bondholders conference, held at Richmond on the 10th day of November, 1874, and composed of a committee of foreign and domestic bondholders), lost by the late war "largely more than half of its wealth," and where "in one of the most fertile sections of Virginia the nocturnal blaze of burning farm buildings, fired by armed invaders, lighted at one time a country extending over a distance of more than sixty miles." And I might further add, in the language of Ex-Governor Henry A. Wise, *clarum et*

*venerabele nomen*, that "the humanities as well as the equities" of this case "are on the side of the wasted and severed state."

I furthermore repeat the argument often presented to this court, that said funding act is in conflict with the 8th section of Article VIII. of the constitution of Virginia, that sacredly devotes the taxes named to the cause of education, and which the funding act, by its coupons applies and diverts to payment of the public debt—and I will again content myself with the reasoning of Judge Staples, on pages 359–60, of 22 Gratt., Antoni *vs.* Wright.

Another serious objection to the said coupon, is that section 10, article 1 of the constitution of the United States declares that "no state shall emit bills of credit." When the coupon was made tax-receivable it was made currency thereby; became negotiable in so much as it is payable to bearer and thus it possesses all the elements and attributes of commercial paper, in which of course is included bills of credit.

In connection with the foregoing constitutional objection to the coupon, it would seem clear that a collector should only be required to receive upon "the presentation of the proper coupon." This was the view of Rives, judge, in Arents *vs.* The Commonwealth, 18 Grat., 750. If the coupon was bought for the purposes of speculation or payment of taxes, and the coupon should be suspected or known to be fraudulent or counterfeit, the holder takes it subject to all equities, which the state might have against it in any hands. He is liable to any precaution or requirement that the state might exact to establish the *bona fides* of the coupon. These bonds, with these coupons as above indicated, have all the qualities and incidents of commercial paper. The coupons are payable to bearer; they are transferable by mere delivery; their very form indicates that they were designed to be put on the market; their very receivability for taxes and other characteristics were intended to promote their credit and make them desirable to business men. How can this be maintained, when their very genuineness is clouded with suspicion? In the last-named case, one of the points made against the bonds issued by the city of Wheeling, was that the coupons had been stolen after the day when they became due and payable, and objection was made to the plaintiff's title on this ground, and the principle was there settled, on page 777, that a party who takes a negotiable instrument like a coupon, by endorsement or delivery, gets no better title than the party from whom he received it; and where suspicion attaches to such instrument, that the necessity of the thing, from principles of public policy and convenience, require the prevention of frauds by detecting each particular instance of fraud, if possible, where there are any circumstances of fraud in the transaction, and while that case is not analogous to this, yet there runs, through the whole decision, the

idea that for the furtherance of justice, where there are grounds for suspicion, the question of fraud, by proper legal proof, should always be left to a jury.

If the obligor of a bond has reason to doubt its genuineness, the courts authorize his plea of *non est factum*, which puts in issue the very execution of the instrument and its *bona fides;* so in the case of a mere promissory note, an I. O. U., or other simple contract in writing, where the promissor or maker doubts their integrity, proper pleas of *nil debit* or *non assumpsit*, according to the form of action adopted, may be resorted to, and a jury invoked to try the issue. This is all the commonwealth of Virginia has demanded for herself in the act under discussion. She merely claims for herself the same trial by jury that she accords to every private citizen within her borders, for the ascertainment of right and the discovery of wrong. She does not design to defraud her creditors, but to protect them; not to inflict injury, but to prevent it; nor to protect one at the expense of others, but to protect them also by the enactment of a law that will require the verification, proof, and identification of the real, lawful, and genuine coupons. It is said that no creditor has "a vested right to do a wrong," and in this case, no creditor has the right, moral, equitable, or legal, to distress the revenues of a state, by demanding the indiscriminate payment of securities, when it is an established fact, that the markets of the country are flooded with fictitious instruments in the similitude of the genuine ones. Their very self-executing qualities, without the restraint of salutary judicial remedies, would prove the self-destruction of the state herself. It is supererogatory to say that every creditor, be he the holder of whatsoever class of security, must submit himself to the restraining remedial processes of courts, that merely modify his remedy, without substantially impairing its efficiency, but at the same time leaving the obligation of his contract intact.

In addition to the express, specific remedy allowed the creditor, by the act approved the 14th of January, 1882, a reference to chapter 44, Code 1873, page 416, will show that there is a general mode prescribed therein for the recovery of claims against the state or against corporations or boards or departments composed of the officers of the state government, and in that chapter it is provided that "where a person has any other claim against the commonwealth, redress may be had in the circuit court of the city of Richmond by a petition or by a bill in chancery; and by the second section of the said act it is provided that the auditor shall be made a defendant; that he shall file an answer stating his objection to the claim; and that the cause shall be heard without any *unnecessary delay* upon the petition or bill and answer and the evidence. The third section, in express terms, as in the act now

under consideration, authorizes the court to cause a jury to be impanneled to ascertain *any* facts which may be disputed, or the amount of any claim which may be unliquidated; and that its judgment shall be such as the law, or its decree such as equity may require."

I refer to this to show how needless and unnecessary it was for petitioner in this case to resort to the rare, extraordinary, and expensive proceeding by *mandamus*, while he had at the same time the specific remedy named in the act, as well as the general remedy allowed by the general laws of the state just recited to the court.

Why did not the petitioner, Antoni, follow the example of Higginbotham's executrix *vs.* The Commonwealth, in 25th Grattan, page 627, and proceed by petition in the circuit court of Richmond city; as the court therein decided that under this statute (meaning chapter 44 of Code of 1873) the state of Virginia may be sued for any debt or claim due, whether liquidated or unliquidated. It is well settled by all the books that "the right to a particular remedy is not a vested right." The only exceptions to this rule are where the remedy is a part of the right itself, and are rare in their character. It has been decided by nearly every state court in this Union, that every state has complete control over the remedies which it offers to suitors in its courts; that it may abolish one class of courts and create another; it may give a new and additional remedy for a right already in existence, or it may abolish old remedies entirely and substitute new ones. The only modification of this rule is that the right itself must not be taken away. "The obligation of a contract has been defined to consist in its binding force on the party who makes it." It cannot be impaired, but the remedy for the enforcement of that right is no part of the contract, provided there be left a sufficient means of enforcing that right. Cooley's Con. Lim., 2d ed., ch. 11, p. 361–2, and numerous cases there cited.

But I beg to remind the court that the act of the 14th of January, 1882, under consideration, was modelled after a bill passed by the General Assembly of Tennessee, and which has recently received the judicial endorsation of the supreme court of the United States, in the case of Tennessee *vs.* Sneed, reported in 6 Otto, 96 vol. U. S. Reports, page 89.

That case and this are so completely similar that I will compare the cases as the strongest argument in behalf of this case.

In 1874 one Bloomstein presented his petition to the circuit court of Tennessee, sitting at Nashville, in which he stated that he was a taxpayer, and that, as such, he was assessed for state taxes for 1872 to the amount of $132 60; that he had tendered to Sneed, who was collector of taxes for the city of Nashville, in payment of his said taxes, the amount thereof as follows: $2 60 in legal tender currency of the United States, and $130 in bills of the Bank of Tennessee; that the same were

funds receivable by law for the payment of taxes; that the funds tendered were originally made payable in gold or silver coin, and were embraced within the 12th section of the act chartering said bank in 1838, and which 12th section is as follows:

"Section 12. Be it enacted, That the bills or notes of the said corporation originally made payable, or which shall have become payable, on demand, in gold or silver coin, shall be receivable at the treasury, and by all tax-collectors and other public officers, in all payments for taxes or other moneys due the state."

He prayed for an alternative writ of *mandamus* to compel Snead, the collector, to receive the said bank bills in payment of his taxes, or to show cause to the contrary. To this writ the defendant, by the attorney-general of Tennessee, answered, and showed cause that by an act of 28th of February, 1873, the Legislature of Tennessee enacted as follows: "That no court has, or shall hereafter have, any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state, acting by authority of the state, with a view to reach the state, its treasury funds, or property; and all such suits now pending, or hereafter brought, shall be dismissed as to the state, or such officer, on motion, plea, or demurrer of the law officer of the state, or counsel employed by the state."

And that on the 21st of March, 1873, the said Legislature of Tennessee also enacted as follows: "That in all cases in which an officer charged by law with the collection of revenue due the state, shall institute any proceedings, or take any steps for the collection of the same, alleged or claimed to be due by said officer from any citizen, the party against whom the proceeding or step is taken, shall, if he conceives the same to be unjust or illegal, or against any statute or clause of the constitution of the state, pay the same under protest; and upon his making said payment, the officer or collector shall pay such revenue into the state treasury, giving notice at the time of payment to the comptroller that the same was paid under protest; and the party paying said revenue may, at any time within thirty days after making said payment, and not longer thereafter, sue the said officer having collected said sum, for the recovery thereof. And the same may be tried in any court having jurisdiction of the amount and parties; and if it be determined that the same was wrongfully collected, as not being due from said party to the state, for any reason going to the merits of the same, then the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded; and, thereupon, the comptroller shall issue his warrant for the same, which shall be paid in preferenee to other claims on the treasury." Section 2 of the act provides, "that there shall be no other remedy in the case of the collection of revenue, or attempt to col-

lect revenue illegally, or attempt to collect revenue in funds only recoverable by said officer under the law, the same being other or different funds than such as the tax-payer may tender, or claim the right to pay, than that above provided; and no writ for the prevention of the collection of any revenue claimed, or to hinder or delay the collection of the same, shall in anywise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and in no other manner." The act of March, 1873, provides, "that the several tax-collectors shall receive, in discharge of the taxes and other dues to the state, bank notes of the bank of Tennessee, known as the old issue, warrants on the treasury, legally outstanding, gold, silver, national bank notes, and nothing else."

The court will observe that by this act the bills or notes of the said bank of Tennessee possessed exactly the same attributes of receivability that are claimed for the coupons of Virginia, issued under the said funding bill of March, 1871.

The main defence in Tennessee *vs.* Snead, was that the said acts of 1873, hereinbefore recited, were laws that impaired the obligation of the contract in the 12th section of the said bank charter, also hereinbefore recited, which provided that the said bills or notes of the said bank should be receivable by all tax-collectors in all payments for taxes due the state. It was claimed that the said impairment of said obligation was not by direct infraction, but by placing such impediments and obstructions in the way of its enforcement, by so impairing the remedies, as practically to render the obligation of no value. The case was taken to the supreme court of Tennessee, and the judgment of the court below, dismissing the petition, was there affirmed. From that judgment of affirmance, the case was carried by writ of error to the supreme court of the United States, and was again affirmed by a unanimous court, composed of Chief Jastice Waite, Justices, Clifford, Strong, Bradley, Swain, Harlan, Miller, Field and Hunt—the latter delivering the opinion of the court. The court reviewed all the decisions, *pro and con*, bearing upon the question, and after a thorough review and discussion of them all, the rule laid down in Bronson *vs.* Kinzie, 1 How., 311, was reaffirmed, and the doctrine judicially enunciated, that "If a particular form of proceeding is prohibited and another is left or is provided which affords an effective and *reasonable* mode of enforcing the right, the obligation of the contract is not impaired."

That "the rule seems to be in the modes of proceeding and of forms to enforce the contract, the Legislature has the control, and may enlarge, limit or alter them, provided that it does not deny a remedy, or so em-

barrass it with conditions and restrictions as seriously to impair the value of the right."

The remedy allowed Sneed and other tax-payers, in Tennessee, by the Acts of 1873, referred to, was decided by the court to be simple and effective. How much more simple and effective is the remedy given the holder of the Virginia coupon by the Virginia act of January 14th, 1882? The supreme court say that "a suit at law to recover money unlawfully exacted, is as speedy, as easily tried, and less complicated than a proceeding by *mandamus*. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also made for the prompt payment of the amount by the state if judgment is rendered against the officer on the merits."

A mere reading of the Virginia statute under consideration will demonstrate *a multo fortiori*, that the rights and remedies of the creditor are more amply protected. The supreme court of the United States concluded, in the light of all the authorities, that there was no ground for the assertion of petitioner, that a speedy and effective remedy was not provided to enforce the claim set up by him.

It is proper to remind the court, in this connection, that the remedy by *mandamus* had existed in Tennessee long anterior to 1873, and that it was treated in Tennessee *vs.* Sneed as an extraordinary remedy, available only where there was no other effective remedy at hand.

I have, at some pains, ascertained that since the organization of the state government of Tennessee there never has been a day that this writ did not exist in that state until the passage of the act of 1873. As early as 1831 there was an act brought into the Code of that state, section 3,567, *et seq.*, which regulates the mode of issuance and practice under the writ of *mandamus*. It has always been considered there that their courts had the power to issue the writ in all cases where it was allowable at common law. That state could not be sued by *mandamus*. or in any other form, until 1855, when a general right of action was given against the state. The statute then enacted was carried into the Code, and is found in section 2,807; but it was repealed by 1865, 36–34. The right to compel any of the officers of that state by *mandamus* merely to perform ministerial duties, I feel sure, has always been recognized and was precisely the same in 1838, previously thereto, and subsequently and continuously up to 1873, when it was repealed by the act of that year. The decisions of the court of Tennessee on the subject of *mandamus* are found in King's Digest, under title of *mandamus*, and in the notes of Thompson and Steger's Revised Code, section 3,567. An examination of the foregoing will show that the doctrines laid down in Tennessee *vs.* Sneed, and Railroad Company *vs.* Tennessee, are equally applicable to Tennessee and Virginia.

The decision of Tennessee *vs.* Sneed, so conclusive of the case at bar, was rendered at the October term, 1877, of the supreme court of the United States; but I am fortunate in this, that in the very last reports of the decisions of the said court (vol. 101, 11th Otto), there are three cases, adjudged as late as October, 1879, seven years since the rendition of Antoni *vs.* Wright, in which the principles enunciated in Tennessee *vs.* Sneed, and relied on by the commonwealth in this case, are explicitly approved. I will recapitulate briefly the three cases. First, the Railroad Company *vs.* Tennessee, p. 337. In 1838, the state of Tennessee established a bank, pledged its faith and credit to indemnify for all losses arising from a deficiency in capital. She was a stockholder, and entitled to all the profits of the business. The bank was, by its charter, capable of suing and being sued. The state, by its constitution, article 1, section 17, was liable to be sued in such manner and in such courts as the Legislature might by law direct. In 1855, the Legislature of the state enacted—see Code, section 2,807—that suits might be instituted against the state, under the same rules and regulations that governed actions between private citizens, process to be served upon the district attorney of the state. *While this remedy was in force*, the said bank, so indemnified by the state, contracted a debt to the Memphis and Charleston Railroad Company; after said debt was contracted, to wit, in 1865, the Legislature of Tennessee repealed the law of 1855, which gave the remedy by suit against the state, and after that time there was no law prescribing the manner or the courts in which suits could be brought against the state. In 1872, the railroad company instituted proceedings setting forth the indebtedness due them from the said bank, and made the state of Tennessee and the bank parties, and sought to enforce the liability against the state, under the indemnity clause of the charter. The state, by her attorney-general, appeared and demurred to to bill of the railroad, and assigned for cause, among others, that the state could not be sued. The chancery court at Nashville sustained the demurrer and dismissed the bill of the railroad. The case went, by appeal, to the supreme court of that state, where the decree of the court below was affirmed. It then was carried by writ of error to the supreme court of the United States, and was there affirmed, Chief Justice Waite delivering the opinion of the court, upon the express ground that the repeal of the law by the Legislature of Tennessee, authorizing suits against the state, was valid and did not impair the obligation of the contract which the railroad had with the state; the reason assigned being, that the constitution protects only such remedies as are required to *enforce* the contract, and the state having given the remedy could withdraw it. Only two of the justices, Swain and Strong, dissented from the opinion.

Hard upon this case followed The Railroad Company *vs.* Alabama, reported on page 832. The South and North Alabama railroad company brought a suit in chancery at Montgomery against the state of Alabama, for a three per cent. fund claimed by the railroad under a contract and legislation made by the said state with the railroad in 1860. By the laws in force at the time of the contract, the state of Alabama was liable to suit, and when the proceedings of the railroad were begun, but before the final hearing thereof, the law giving the remedy was repealed. Upon the trial of the cause, on motion of the state, the suit was dismissed for want of jurisdiction. There was an appeal both to the supreme court of the state and the supreme court of the United States, and affirmances by both of the said courts—Justice Swain alone dissenting in the latter. The opinion of the latter court was that Alabama had not granted such a remedy for the enforcement of the contract as that her sovereignty under the constitution of the United States could not take away.

The third and last case is found on page 814—Stone *vs.* Mississippi. In 1867 the Legislature of Mississippi incorporated the Mississippi Agricultural and Manufacturing Aid Society; and in consideration that said society would pay before the commencement of its business to the treasurer of the state, for the use of the University of the state, five thousand dollars and an annuity of one thousand dollars and one-half per cent. of receipts, the Mississippi Legislature, by the act of incorporation, contracted that the charter of the company should continue in force for the period of twenty-five years. The company complied with the contract until 1874, when the attorney-general of Mississippi filed his *quo warranto* to vacate the charter, upon the ground that by an act of the Legislature of 1870, such charter had been repealed under a subsequent constitution, adopted in 1868. The corporation contended that their charter was a vested right, granted in 1867, prior to the state constitution of 1868 and the repealing act of 1870; but the state court vacated the charter, and gave a judgment of *ouster* of all liberties, franchises, and rights thereunder. This was carried to the supreme court of the United States by writ of error, and there affirmed.

Chief Justice Waite denied that the legislature have the power to bind the state and succeeding legislatures. He said, "irrevocable grants of property, &c., may be made, if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." "No government, he says, on page 820, "dependent on taxation for support can bargain away its whole power of taxation, for what would be substantially abdication; all that has been determined thus far is, that for a consideration, it may,

in the exercise of a reasonable discretion, and for the public good, surrender a part of its power in this particular. The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. The several agencies can govern according to their discretion, if within the scope of their general authority while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters, the government of which, from the very nature of things, 'must vary with varying circumstances.' The contracts which the constitution protects are those that relate to property rights, not governmental." Having commented upon and explained the Dartmouth college case, he concluded for the court, that the repeal of the rights of the company did not impair the obligation of the contract, and consequently found that there was no error in the record.

The law of Virginia for the recovery of claims against the state is as limited as the laws of Tennessee and Alabama. The sixth section of chapter 44, Code of 1873, provides that no judgment or decree against the commonwealth exceeding $300 dollars, shall be paid without a special appropriation therefor by law. By an act approved March 13, 1875, in Acts 1874–5, page 253, the said sixth section is so amended as to read, "No judgment or decree against the commonwealth shall be paid without a special appropriation therefor by law."

It is true that by the 6th article, section 2, of the constitution of Virginia, it is provided that "the supreme court of appeals shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus and prohibition." This was not intended to be regarded as a vested power or right in that court to issue mandamus where no statute prescibed the mode of procedure, but was merely intended to give said court original jurisdiction in cases where the remedy of mandamus has been provided for by statutory law. Therefore, by chapter 156, section 4, of the Code of 1873, mandamus is only conferred where it may be necessary to prevent a *failure of justice;* in which case a mandamus may issue according to the principles of the common law. Then, I reaffirm, that this court has no jurisdiction by mandamus, because the petitioner had other plain, adequate and complete remedies at law, and there was no such failure of justice in this case necessary to be prevented. If any further reason is necessary to be added, I will call the court's attention to the fact, that since this proceeding by *mandamus* was instituted, the General Assembly of Virginia has passed, and the governor has approved, on the 7th day of April, 1882, the following act, which deprives the supreme court of appeals of jurisdiction by mandamus in cases similar to this:

1. Be it enacted by the general assembly of Virginia, that chapter 156, section 4, of the Code of Virginia of 1873, be amended and re-enacted so as to read as follows:

§ 4. The said supreme court, besides having jurisdiction of all such matters as are now pending therein, shall have jurisdiction to issue writs of *mandamus* and *prohibition* to the circuit and corporation courts, and to the hustings court and chancery court of the city of Richmond, and in all other cases in which it may be necesary to prevent a failure of justice, in which a *mandamus* may issue according to the principles of the common law: provided that no writ of *mandamus*, prohibition, or any other summary process whatever, shall issue, in any case of the collection or attempt to collect revenue, or to compel the collecting officers to receive anything in payment of taxes other than is provided in chapter 41, Acts of Assembly, approved January 26, 1882, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the protection and enforcement of his individual right, claim, and demand, if just. The practice and proceedings upon such writs shall be governed and regulated in all cases by the principles and practice now prevailing in respect to writs of *mandamus* and prohibition, respectively.

2. This act shall be in force from its passage.

The foregoing cases referred to in 11th Otto, fully sustain the right of the General Assembly to pass such legislation, as does also the authorities referred to in Cooley on Con. Lim., 2d edition, page 363.

In Higginbotham *vs.* Commonwealth, the court decided that it could only adjudge Higginbotham's claim to be just and due, and that it ought to be paid, and that judgment should be rendered against the commonwealth, as a matter of course; but that the court *had no power* to control, or in any manner to interfere with the discretion of the Legislature in making provision for the payment of the debt. And the court held that, under the 6th section of chapter 44 of Code of 1873, the judgment being for more than three hundred dollars, it had no authority to require the auditor of public accounts to issue his warrant for the amount; and in such cases, the provision to be made for the judgment is expressly reserved to legislative discretion, and to that discretion we must leave it.

Now, by the Acts of 1874–5, page 253, the 6th section of chapter 44 is amended, and the words "exceeding three hundred dollars" stricken out, so that *no* judgment or decree against the commonwealth shall be paid without a special appropriation therefor. Therefore the courts of Virginia, in the language of Chief Justice Waite, in the cases hereinbefore referred to, are but auditing boards for claims against the commonwealth. The principle is elementary that a state cannot be sued in her own courts without her consent. This is a privilege of sovereignty. Where a judgment has been rendered against the state, the liability of the state has been judicially ascertained, but there the power of the

court ends, and the state is at liberty to determine for itself whether to pay the judgment or not. The courts are powerless. Everything after the judgment depends upon the mere will of the state. This is the doctrine laid down in the last decisions rendered by the supreme court of the United States, and reported 101st vol. U. S. Reports, and *ita lex scripta est*, is argument enough for the judicial mind.

With the foregoing views, fortified by the said authorities, I respectfully ask, on the part of the commonwealth of Virginia, that the prayer of said Andrew Antoni, for a peremptory *mandamus* may be refused, and that his petition may be dismissed at his cost.

F. S. BLAIR, Attorney-General,
*For the Treasurer and the Commonwealth of Virginia.*

OFFICE SUPREME COURT U.S.
FILED
DEC 1882
JAMES H. MCKENNEY, Clerk.

19769

# SUPREME COURT OF THE UNITED STATES.

No. 845.

ANDREW ANTONI, PLAINTIFF IN ERROR,

vs.

SAMUEL GREENHOW, TREASURER OF THE CITY OF RICHMOND.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

## A Brief on the Side of the Plaintiff in Error, Filed in Behalf of other Creditors.

BY

DILLON & SWAYNE,

*Counsel for the Intervening Parties.*

BURGOYNE, Printer, 57, 59 & 61 Park St. (Law Telephone 587), N. Y.

## Addendum.

Suppose every State in the Union where coupon bonds have been issued by itself, or its corporation, and the United States, should pass an act like the Virginia act of the 14th of January, 1882, requiring the genuineness and validity of every coupon to be established by a local suit before payment, what would be the consequences at the commercial centres where such securities accumulate and elsewhere? The imagination cannot overdraw the shock and the widespread ruin that would ensue.

It is not claimed that any counterfeit or invalid Virginia coupon was ever seen or heard of.

D. & S.

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1882.

ANDREW ANTONI,
Plaintiff in Error,

vs.

SAMUEL GREENHOW, Treasurer of the City of Richmond.

No. 815.

## Brief upon the side of the Plaintiff in Error.

Representing clients who hold a large amount of securities to be vitally affected by the decision of this case, we have asked and obtained leave of the Court to file a brief in their behalf. The questions arising in this case are identically the same with those arising in the cases of our clients.

The facts and the law to be considered lie within narrow limits. No extended discussion of either is, therefore, deemed necessary on our part.

### I. *The Contract.*

By an Act of the Legislature of Virginia of the 30th of March, 1871, the State offered to those holding her bonds "New bonds for two-thirds of the entire debt, principal and interest to run for thirty-

four years, with interest payable semi-annually on the aggregate amount of principal and interest, the bonds to be coupon or registered, at the option of the creditor, and to be converted into one or the other, at the like option, and to secure '*the prompt and certain payment of the interest as the same shall fall due*,' and to give the coupon greater value—they were to be '*receivable at and after maturity for all taxes, debts, dues and demands due the State*,' which should be so expressed on their face."

Judge Bouldin's Opinion, Antoini vs. Wright, 22 Grat., 838.

The other third of the debt is in no wise involved in this controversy, and need not be more particularly adverted to.

The creditors accepting the new bonds were to surrender the old ones to be cancelled. A large portion of the creditors accepted the offer of the State thus made, and new bonds were issued and received accordingly. The old bonds were thereupon surrendered. The coupons attached to the coupon bonds conformed to the law.

The one upon which this case is founded is given as a specimen:

"Receivable at and after maturity for all taxes, "debts and demands due the State.

"The Commonwealth of Virginia will pay the "bearer three dollars interest, due January 1, 1882, "on bond No. 6498.

"GEORGE RYE,

"Treasurer of the Comonwealth of Virginia."

Coupon No. 21.

Here is a contract. Its terms are simple and explicit. Human language cannot express anything

more clearly. It had every ingredient necessary to its validity. It was fairly, openly, and deliberately made. There was a sufficient consideration. The object was praiseworthy. The parties were competent to contract and their minds met.

The modus of the execution of the receivability clause was brief and simple—as much so as payment by one party and receipt by the other under any other circumstances.

**II.** *The Repudiation Acts.*

I. The Act of January 14, 1882: ("Acts of the Assembly of Virginia of 1881-1882, chap. 7, p. 10), which lies at the foundation of this litigation, provides:

1. That when coupons are offered in payment of taxes the collector shall give a receipt for them.

2. He shall collect the taxes in money, and if payment be refused it shall be enforced as in other cases.

3. The holder of the coupon may thereupon sue upon it by petition against the commonwealth.

4. The petition must allege "that he has tendered the coupon in payment of his taxes," &c., "and pray that a jury may be empannelled" to try the question whether they are genuine *legal coupons* which are *legally receivable for taxes, debts and demands*"!! The issue is to be tried by a jury, "and either party shall have a right to exceptions on the trial, and of appeal to the Circuit Court and Court of Appeals. If it be *finally* decided in favor of the petitioner that the coupons are *genuine receivable for taxes, and so forth*, then the judgment

of the Court shall be certified to the treasurer, who upon receipt thereof shall receive said coupons for taxes and refund the money before then paid by the taxpayer for his taxes out of the first money in the treasury in preference to all other claims."

Lord Coke says the phrase, "and so forth, containeth much learning."

The requirement that after judgment the treasurer "shall receive said coupons for taxes," involves an anachronism, a contradiction and a solecism.

This is clearly so for several reasons:

(1) The taxes must have been paid at the outset. Until this was done the petition could not be filed.

(2) When such payment was made the tax was satisfied and extinguished, and no farther question could arise upon the subject.

(3) When the money was finally paid by the treasurer the State became the owner and holder of the coupons.

(4) They were not and could not be received in payment of the taxes, for the taxes had been paid before—it may be years before. Their liquidation was therefore a thing finally done under the other clause of the coupon, which required the commonwealth to pay the money.

(5) All, the holders of the coupons could do at the end of the litigation was to await their payment by the Treasurer. In the meantime they were not even then receivable for taxes, and if never paid, they could never be so received. The idea that the act, is *a remedy*, strikes strongly, though painfully, one's sense of the ludicrous. If the act be valid, we cannot doubt that these bonds — like those of Mississippi, repudiated more than fifty years ago— will, as it were, be stricken out of existence, become

worthless to the holders, and finally disappear from the market. Such was the intent and purpose of the act. The constitutional guaranty will be less comprehensive and efficient than has been supposed.

This is not a remedy, real or pretended, for the enforcement of the receivability clause, but the annihilation of that clause and the arbitrary and *revolutionary substitution* of a wholly distinct and different thing. The plaintiff in error asked for bread and was offered a serpent.

II. The acts of January 29, 1882, Acts of Assembly of Virginia, 1881–1882, Ch. 41, p. 37, declares "that the several tax-collectors of this Commonwealth shall receive in discharge of the taxes, license taxes, and other dues—gold, silver, United States Treasury notes, national bank currency, *and nothing else.*"

It concludes, as follows:

"Any officer charged with the collection of rev-
"enue, who shall receive any thing other than that
"hereinbefore provided, shall be deemed guilty of a
"misdemeanor, and fined not less than one hundred
"nor more than five hundred dollars in the discre-
"tion of the court; but nothing herein contained
"shall be construed to subject any officer of the
"State to any suit other than as hereinbefore pro-
"vided, for any refusal on his part to accept in pay-
"ment of revenue due the State, any kind or de-
"scription of funds, security or paper not authorized
"by this act.

"This act shall be in force from and after the
"first day of December, 1882."

The body of the act contains provisions touching suits by the holders of securities who had tendered them, against the collector, who had refused to receive them.

This act is not adverted to in the opinions found in the record of the Judges of the Court of Appeals, nor in the certificate which they gave touching the State Statutes, which were drawn in question. We assume, therefore, that it has no application to the case in hand. We have referred to it, because it is named in another statute hereafter to be mentioned, which is material in this case.

**III.** *The Repudiated Remedy.*

It is declared in the Code of Virginia of 1873, Ch. 156, sec. 4, p. 1049, that the Supreme Court of Appeals of the State "shall have jurisdiction to issue writs of mandamus and prohibition to the Circuit Courts and Corporation Courts and to the Hustings and Chancery Court of the City of Richmond, and in all other cases in which it may be necessary to prevent a failure of justice—in which a mandamus may issue according to the rules of the common law." As to the power of other courts to issue such writs, see Idem, pp. 1033, 1049.

On the 7th of April, 1882, (Acts of Assembly of 1881-1882, Ch. 34, p. 242), the Legislature passed an "Act to amend and reenact Sec. 4, Ch. 186 of the Code of 1873, in relation to mandamus prohibition, &c."

This act provides that "the said Supreme Court" shall have power to issue writs of mandamus and prohibition in all proper cases, "provided that no writ of mandamus, prohibition, or any other summary process whatever shall issue in any case of the collection, or attempt to collect anything in payment of taxes other than is provided in Ch. 41, Acts

of Assembly, approved January twenty-six, eighteen hundred eighty-two, or in any case arising out of the collection of revenue in which the applicant for the writ or process has any other remedy adequate for the prosecution and enforcement of his individual right, claim, and demand, if just."

**IV.** *Extracts from the opinions of Judges who heard the case in the Court of Appeals, references to other Virginia cases, and remarks upon this case.*

"Antoni *vs.* Greenhow, Treasurer." } Opinion of Anderson, Judge

I am of opinion that the act of Assembly approved January 14th, 1882, which is relied on to justifiy the refusal of Greenhow (treasurer) to receive the coupon tendered by the petitioner for his taxes due the State, is plainly in violation of the Constitution of the State and of the United States. Whilst its professed object in its title is "to prevent frauds upon the Commonwealth and the holders of her securities." it in effect destroys *or greatly depreciates the value of those securities, and thereby impairs the obligation of contracts* under the vain pretext that it is necessary to protect the Commonwealth against frauds. It not only destroys or renders almost valueless the coupons, but also the coupon bonds, amounting to millions of dollars, issued by the State by authority of the act of March 30th, 1871, and whose value depends upon the prompt payment of interest, of which assurance was given by the State to the holders of those bonds by the stipulation in the contract that the coupons, at and after maturity, should be receivable for all taxes, debts, &c., due the State. This statute of 1882 prohibits the revenue officers to receive any coupon, *though unquestionably genuine*, when tendered for or in discharge of taxes, &c., due the State, and requires the bearer of the coupon so tendered to pay his taxes in coin, or other currency, which, I think, *is plainly a repudiation or annulment of the State's contract.* I am of

opinion that the act provides no remedy for the enforcement of the contract of the State to receive coupons in payment of taxes, but that it repudiates and annuls the same by requiring the bearer and tenderer of the coupon to pay his taxes in coin, &c., and it provides a very inadequate remedy for the tax-payer to recover his money back which has been wrongfully extorted from him.

It authorizes him to bring suit against the State to recover back the money which he has been wrongfully compelled to pay, and to make up an issue to be tried by a jury, without any averment on the part of the State that the coupon he tendered is spurious, whether said coupon is genuine, and not only so, but whether it is legal, and not only so, but whether it is *legally receivable for taxes;* and requires the commonwealth's attorney or the Attorney-General to appear and defend the suit; and allows either party the right of appeal to the Circuit Court and the Court of Appeals. This would be a poor remedy for the tax-payer who had a right, by the pledged faith of the State, to pay his taxes in the coupon which he held to recover back the money which he had been wrongfully compelled by the State to pay, which would be usually small, to involve himself in a suit against the State, with the courts, the attorneys of the commonwealth, and the Attorney-General all against him. When such a suit would end, and how it would end, especially if the legal question whether his coupon was "legally receivable for taxes, debts and demands" was to be left to a jury, would be involved in great uncertainty. To get back his pittance of money wrongfully extorted from him, he would have to subject himself to harassing, protracted, and expensive legislation, with all the chances of success against him, for the reasons stated, and incur costs perhaps tenfold the amount he sought to recover. Can such a remedy be regarded as an adequate remedy, in the place of his remedy by *mandamus*, which the law guaranteed to him at the time the contract was made, and which had been the law of Virginia from a very early period, and which also proved the means whereby the State could test the genuineness of the coupon, if she denied its genuineness, through her officer, in his return to the rule.

The State might do that now; and there was no necessity for such a device and contrivance to destroy the value of the coupon and depreciate the

value of the bond of the State, as would be effectuated by this act, if it is enforced, to protect the State against frauds.

It is very true the court should not declare a law to be unconstitutional if it has grave doubts on the subject. But whilst, in a doubtful case, the court should give to the Legislature that enacted the law the benefit of its doubts, I hold that, where the law is a plain violation of the Constitution, there rests upon the court the highest obligation so to declare. I am of opinion that there is an important distinction between this case and the case of Tennessee vs. Sneed, so much relied on by the Attorney-General.

It is not my purpose to argue the questions involved in the case, but merely to express my opinion upon them. But I will state one of the grounds of my opinion that this distinction exists. In the Tennessee case, the refusal of the State to receive the bank bills in payment of taxes affected only a contract on part of the State that they should be so receivable, and the remedy had to be provided for the breach of the contract in that respect. But in this case there was an obligation on the part of the State, by the contract, which reaches far beyond the obligation to pay the interest coupons in the hands of the bearer—the obligation of the coupon bonds, to which the coupons were attached; the value of those bonds depending upon their being readily convertible into money in the markets, and that depended upon the prompt and punctual payment of the interest semi-annually; and the receivability of the coupons for taxes, for which the State was pledged by the contract, gave assurance that the interest would be punctually paid, and was material to the value of the bond.

The act in question only professes to provide a remedy for the refusal of the State to receive the coupon for taxes, &c., and for the repayment of the money wrongfully coerced from the tax-payer. If the provision made for that is an adequate remedy (which I think it clearly is not), what remedy is provided for the depreciation of the value of the bonds and the impairment thereby of the obligation of the contract of the State vouched by her bonds to which the coupons are attached? There is none; absolutely none.

I refer to the more recent decisions of Hartman vs. Greenhow, and State of Louisiana vs. Pillsbury, Mayor, the latter decided a few weeks ago, as de-

cisive of this case. Indeed I might refer to the unbroken current of decisions of that court prior to the cases alluded to.

Judge Burks, who also heard the case, and whose views were adverse to the plaintiff in error, speaking of the remedy by mandamus, which had been attempted to be taken away, said, "The remedy pro- "vided as a substitute for the writ is found in sec- "tions 1, 2 and 3 of the Act of January 14, 1882. "The question is whether it is an adequate sub- "stitute for the remedy abolished. If it is not, then "according to a long line of decisions of the "Supreme Court of the United States, which need "not be cited, it cannot be sustained."

The cases of Antoni vs. Wright, 22 Gratt., 859, and Clark vs. Sargeant, 30 Gratt., 145, both decided by the Court of Appeals of Virginia, go over the entire ground of this case and exhaust the subject. They are characterized by the fullest reflection and by great ability. So far as we are advised their authority has not been shaken unless by the division of the Judges of that Court in this case.

The prototype of the Act of the 14th of January, 1882, was *invented* in Tennessee, copied in South Carolina, and reproduced in Virginia. Upon the triumphal passage of that act and of its congener of the 7th of April, 1882, they were proclaimed as "coupon killer No 1" and "coupon-killer No. 2."

This Court is armed with the sword and shield for the defence of theConstitution and the protection of those who, standing in its forum, demand the enforcement of their rights. Is it not time that such legislation should be met here—if no where else—by the plain-dealing and plain-speaking which become this high tribunal?

**V.** *Points and authorities in Federal Jurisprudence.*

(1.) Whenever the act of a State Legislature conflicts with the contract clause of the Federal Constitution such act is as if it were not. It is utterly void, and the rights of the parties are to be adjudged and determined in all respects as if it had never existed.

Fletcher vs. Peck, 6 Cr., 137.
State of New Jersey vs. Wilson, 7 *Id.*, 166.
Von Hoffman vs. The City of Quincy, 4 Wall., 535.

This rule is axiomatic in the law as administered by this Court.

In the case last cited there were State statutes which authorized the city to issue its bonds for a loan, and to levy taxes sufficient in amount to meet the interest and ultimately to extinguish the debt. Subsequently the Legislature passed an act restricting the amount of taxes to be levied to a sum barely sufficient to defray the cost of the police and other administration of the Affairs of the City.

This Court held the restricting act to be void, and by mandamus, compelled the levying of taxes according to the provisions of the original acts.

(2.) "One of the tests whether a contract has been impaired is, that its value has by legislation been diminished. It is not by the constitution to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation—dispensing with any part of its force."

Planters' Bank vs. Sharp, 6 How., 327.

(3.) "The obligation of a contract is the law which compels the parties to perform their agreement."

Sturges vs. Crownenshield, 12 Wh., 257.
Von Hoffman vs. Quincey, 4 Wall., 552.

It is a matter of public history, of which this Court can take notice, that when the Act of the 14th of January, 1882, was passed, the value of the bonds fell like the mercury in a freezing thermometer. And they have not yet recovered from this depression.

(4.) In Hartman v. Greenhow, 102 U. S. R., 685, this Court, speaking of the coupons here in question, by Mr. Justice Field, said:

"We are clear that this act of Virginia of 1876, "(Sec. 117) requiring the tax on her bonds issued "under the funding act of March 30, 1871, to be de- "ducted from the coupons originally attached to "them, when tendered in payment of taxes or other "dues to the State, cannot be applied to coupons "separated from the bonds and held by different "owners, without imparing the contract with such "bondholders, contained in the funding act, and the "contract with the bearer of the coupons. It "follows that the petitioner was entitled to a writ "of mandamus to compel the treasurer of the city "of Richmond to receive the coupons tendered to "him in payment of taxes due the State for the full "amount."

Can it be that the State had not the power to require the plaintiff in error to pay a few cents on his coupon as a condition of its being received in payment of his taxes, and yet can compel him, at the maturity of each successive coupon, to go through a process that must swallow up the entire amount of the coupon, and that amount many times over in addition, before he can reach that end?

(5). This adjudication settles finally the validity of the contract here in question as originally made. The only question that can arise is as to the remedy which was a part of that contract, and to which the plaintiff in error would then have been entitled, in the event of default on the part of the State.

Von Hoffman vs. Quincey, *sup.*
Wolf vs. The City of New Orleans, 103 U. S. R., 358.
State of Louisiana vs. Pillsbury, 4 Transcript Rep., 540.

These authorities show that the co-existing remedies, when the contract was entered into, were as much a part of it as if they had been fully written out and it had been expressly provided that the creditor party might, if need be, avail himself of them. The ideas of right and remedy, are inseparable; without the latter the former would be worthless. The remedy is as much within the protection of the Constitution as any other part of the contract, and is entitled to the same inviolable sanctity whenever the question of impairment arises.

(6) It is not denied that the remedy may be modified by subsequent State laws, " provided the alteration does not impair the obligation of the contract."

" But, if that effect is produced, it is immaterial " whether it is done by acting on the remedy or " directly on the contract itself."
Bronson vs. Kinzie, 1 How., 316.

" Any law which, in its operation, amounts to a " denial or obstruction of the rights accruing by the " contract, though professing to act only on the " remedy, is directly obnoxious to the prohibition ' of the Constitution."
McCracken vs. Hayward, 2 How., 612.

"No attempt has been made to fix definitely the "line between the alterations which are to be "deemed legitimate and those which, under the "form of modifying the remedy, impair substan- "tial rights. Every case must be determined on "its own circumstances. Whenever the result last "mentioned is produced, the act is within the pro- "hibition of the Constitution, and, to that extent, "void."

Von Hoffman vs. Quincey, *Sup.*, 534.
See also, 1 Kents Com., 456, and Sedgwick on Const. and Stat. Const., 652.

"The remedy subsisting in a State when and "where a contract is made and is to be performed, "is a part of its obligation, and any subsequent law "of the State, which so effects that remedy as "substantially to impair and lessen the value of the "contract is forbidden by the constitution, and is, "therefore void."

Edwards vs. Kearsey, 96 U. S. R., 607.

(7) That there is gross impairment of the substantial contract rights of the plaintiff in error by the Acts of the 14th of January, 1882, and of April the 7th, 1882, is in our view too clear to admit of doubt or require discussion. We think the proposition is self-evident. Whenever this is so, argument may confuse, but it can add nothing to the force or clearness of the thesis discussed. We forbear to waste time by pursuing the subject further.

(8) The case of Tennessee vs. Sneed, 96 U. S. R. 69, will doubtless be relied upon by the counsel for the defendant in error.

In that case this Court said: "We have in the present action a decision of the Supreme Court of the State, upon its own statutes and modes of proceeding to the effect, (1st) that a writ of *mandamus* in a case like the present, *is a proceeding against the State.*"

And further: "*The question discussed by Mr.*

"*Justice Swayne in Walker vs. Whitehead, (16 "Wall, 314) of the preservation of the laws in ex- "istence at the time of the making of the contract "is not before us.*

In the present case, Virginia has made no such decision. All will admit that a State cannot be sued without her own consent.

This case *does* turn wholly upon "*the laws in existence at the time of the making of the contract.*"

With such points of difference how can that case be regarded as an authority of any weight in favor of the defendant in error?

We refer also to the remarks of Judge Anderson (*supra*) in this connection.

(9) In Edwards vs. Kearsey (*supra*), this Court traced briefly the considerations which led to the adoption of the contract clause of the Constitution. Unprecedented pecuniary embarrassment existed everywhere. Several of the States obstructed or prevented the collection of debts by stay, appraisement, and installment laws and other kindred measures. Creditors and debtors were hostile classes. In some places the former were regarded as outlaws. The contagion was spreading. Private integrity had disappeared from among the latter class, and there was danger that public honesty would soon be known only as a thing of the past and a fossil virtue.

The Constitution applied a sharp but quick and effectual remedy. Confidence was at once restored and prosperity speedily prevailed throughout the country.

It is as important now that this provision of the Constitution should be vigorously maintained and enforced as it was then that it should be adopted.

Lastly, we insist that the Act of January 14th, 1882, requiring suit upon the coupons in question, and the Act of April 7th, 1882, which takes away the remedy by *mandamus*, are both utterly void.

DILLON & SWAYNE,
Counsel for Bondholders
Other than the Plaintiff in Error.

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G. L. Witsil

Wash Board.

N° 43,887. Patented Aug. 16, 1864.

Fig: 1

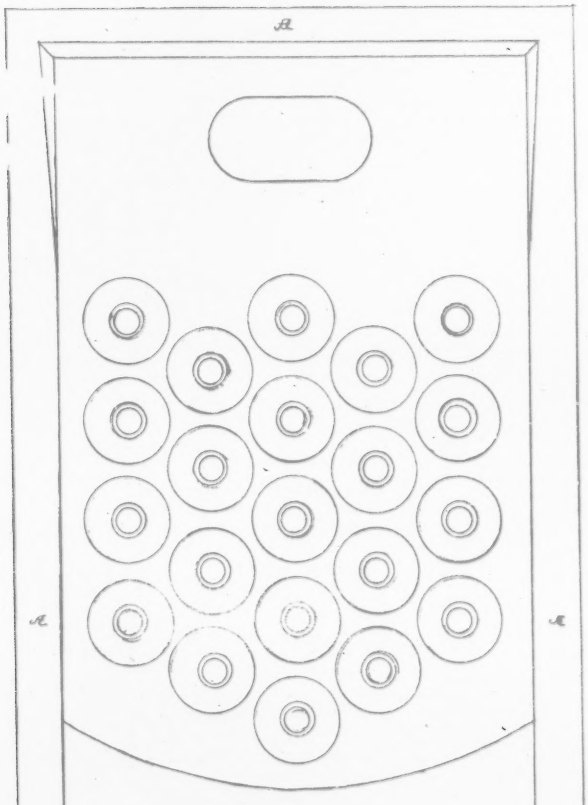
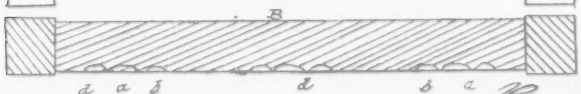



Fig: 2




Witnesses:

W. Albert Steel
Charles Howson

Inventor:

Henry Hirshen
Atty for G. L. Witsil

Bellas & Bowers, Exhibit 6.
O. W. B.
N. P.

Wash Board.

No. 94,551.

Patented Sept. 7, 1869.

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Fig. 1.

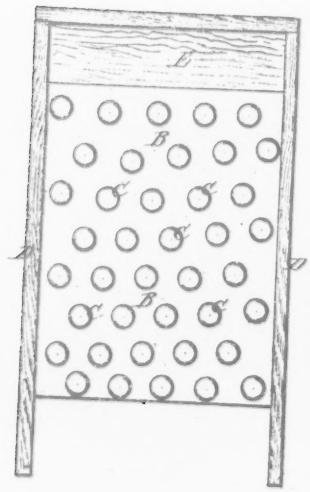


Fig. 2.

Witnesses:
Gustave Dieterich
Jno. E. Brooks

Inventors.
Wm. Bellas
C. Bowers
Per Munn & Co.
Attorneys.

A. R. Crihfield, Exhibit 7
O. C. B
N. P

Wash Board.

No. 108456. Patented Oct. 18. 1870.

No. 187.
Duff et al
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Sterling Pump Co.
Page 58.

Fig. 1.

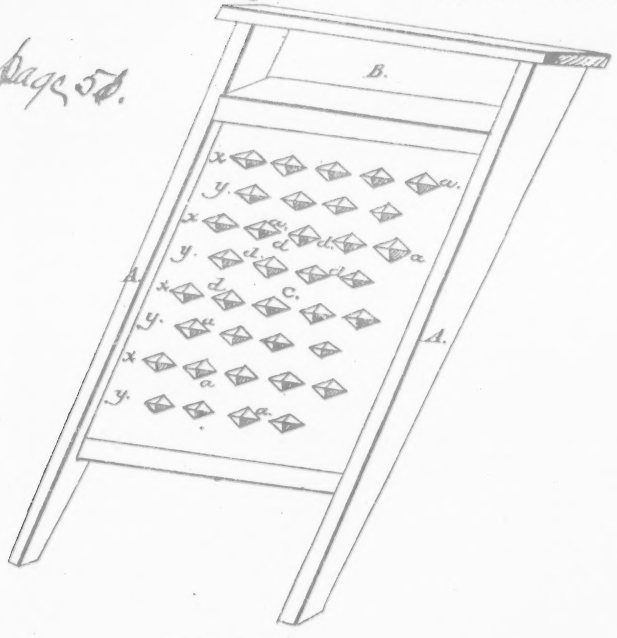


Fig. 2.

Witnesses:
F. A. Lehmann
C. L. Evert

Inventor:
Aylett R. Crihfield
PER.
Alexander Mason
Attorneys.

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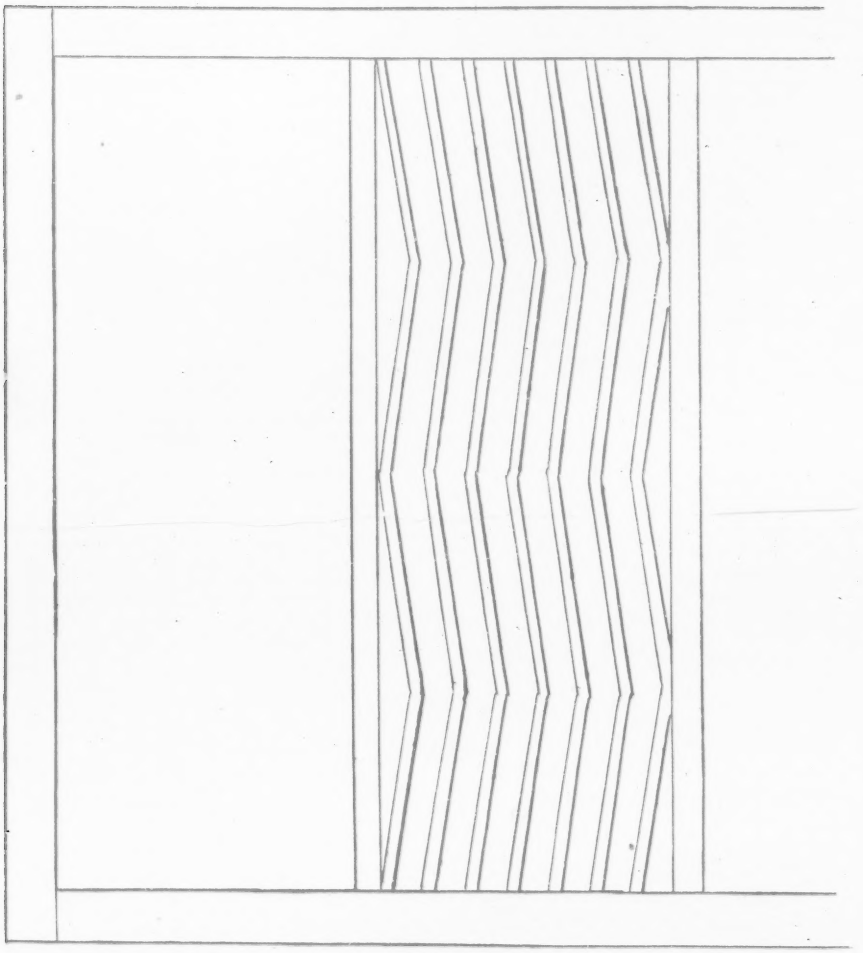
J. Keech

Wash Board.

No. 27 811.

Patented Apr. 10 1860.



Witnesses:

Wm Kurtz

Horace Field Parker

Inventor:

Joseph Keech

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page 27

W. TODD.
Wash-Board.

No 6,673.

Reissued Oct. 5, 1875

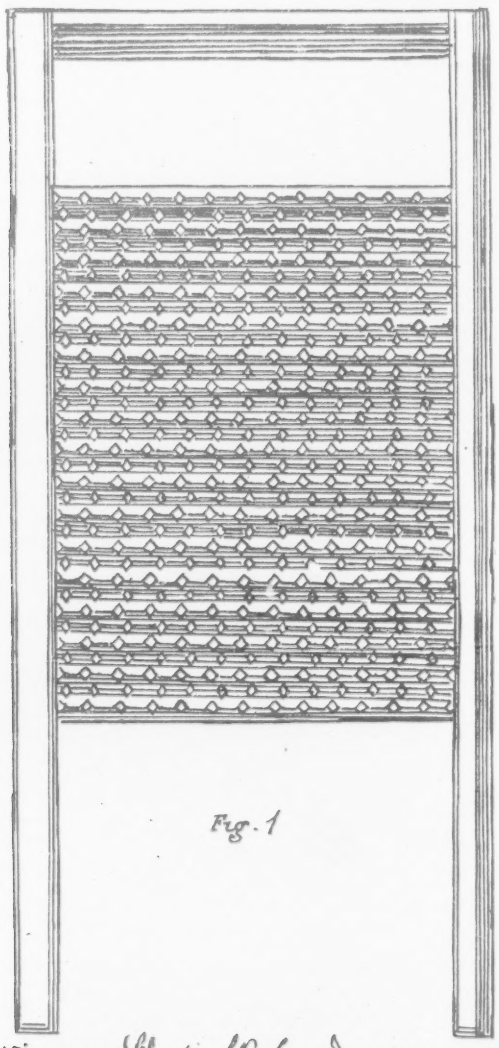

Fig. 1

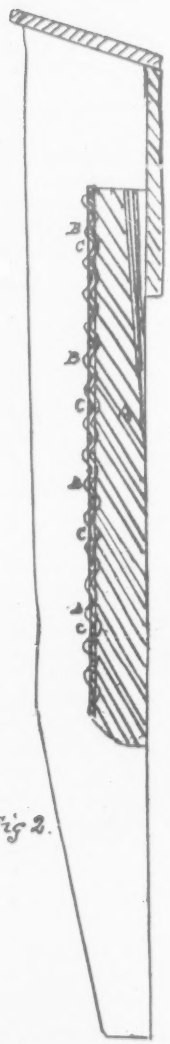


Fig 2.

Witnesses { Claudius L. Parker.
James M. Church

Inventor Wm. Todd
By George A. Christy Atty for him
and his assignees.

# N. Homes,

## Wash Board

No. 47,206. Patented April 11 1865.

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Fig: 4.

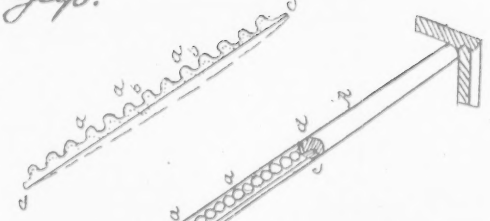
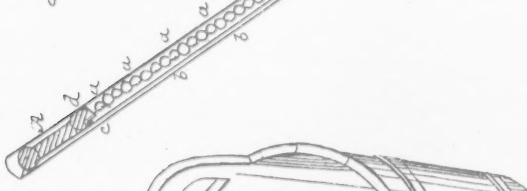


Fig: 2



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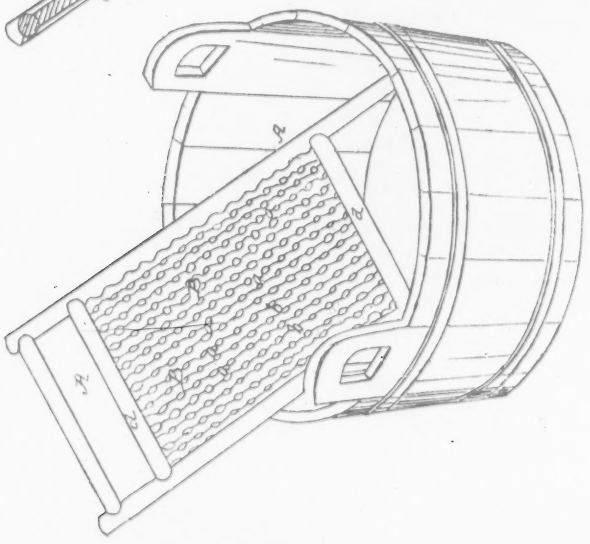

Fig: 3.

Witnesses:
Jay Hyatt
R. F. Osgood

Inventor:
Nelson Homes
By G Fraser & Co
Attys

# A. Hall,

## Washing Machine

No. 39,343.

Patented July 28 1863.

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Fig 1

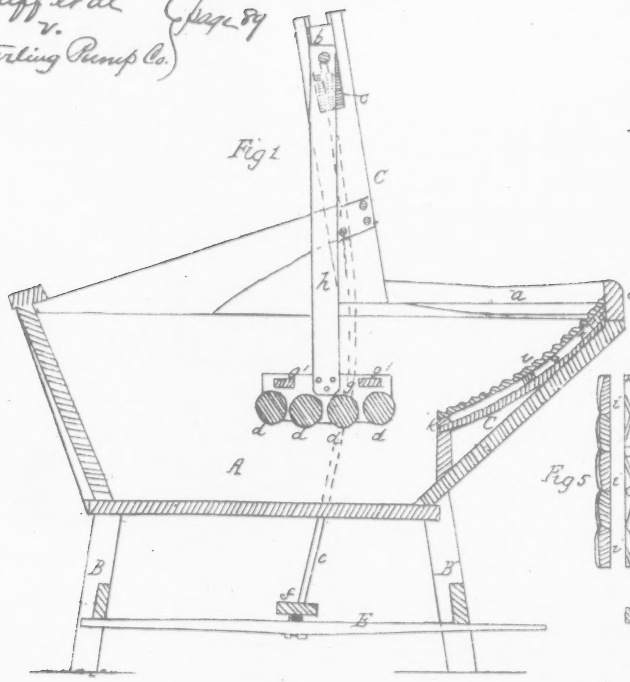



Fig 3

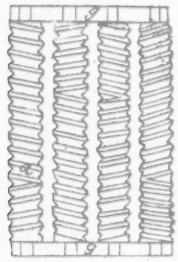



Fig 4

Fig 5

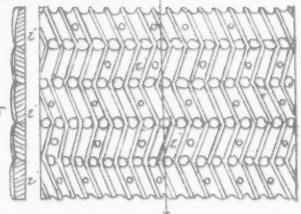
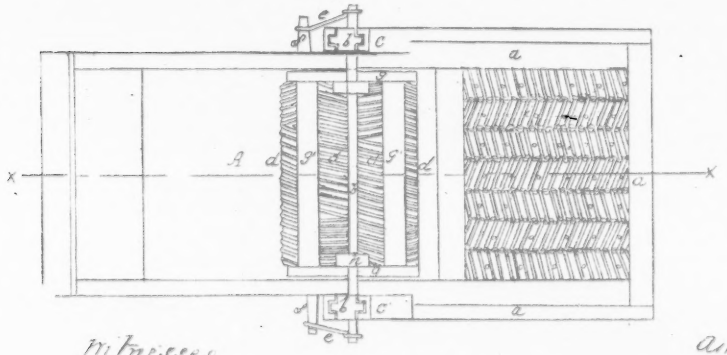



Fig 6

Fig 2




Witnesses
R. G. Campbell
C. Schiffer

Inventor
Asher Hall
by his attys
Mason, Fenwick & Lawrence

# I. S. Parker.

## Wash Board.

No. 14111

Patented Jan 15 1866

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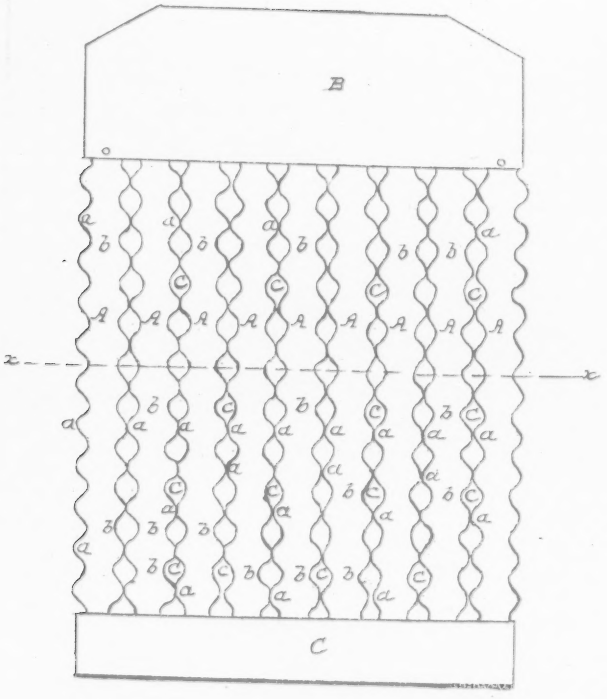
& Sterling Pump Co. } page 75.

Fig: I

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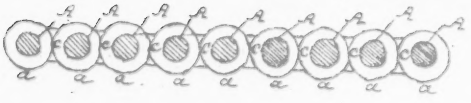

A. J. HULL.

WASH-BOARD.

No. 171,568 Patented Dec. 28. 1875.

Fig. 1.

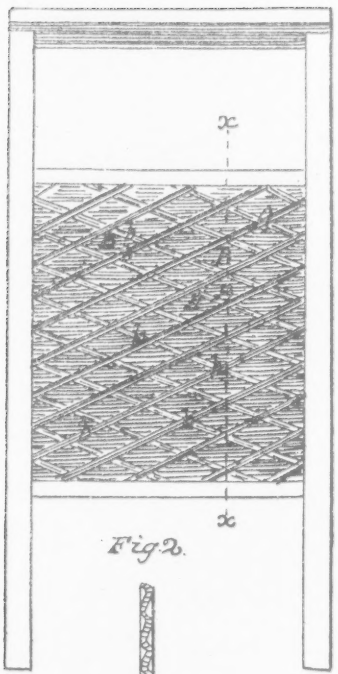


Fig 2.

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Co.
} Page 66.

WITNESSES

Henry N. Miller

C. L. Ewert

By

INVENTOR.

A. J. Hull.

Alexander Thomson.

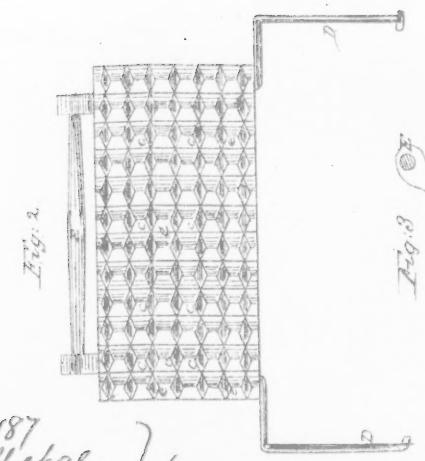
Attorneys.

# J. S. Lash,

## Wash Board.

No. 49 635

Patented Aug. 29. 1865



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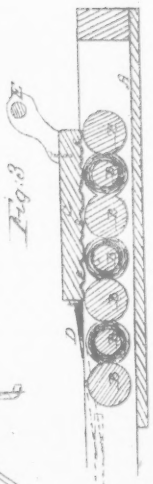

Fig. 3

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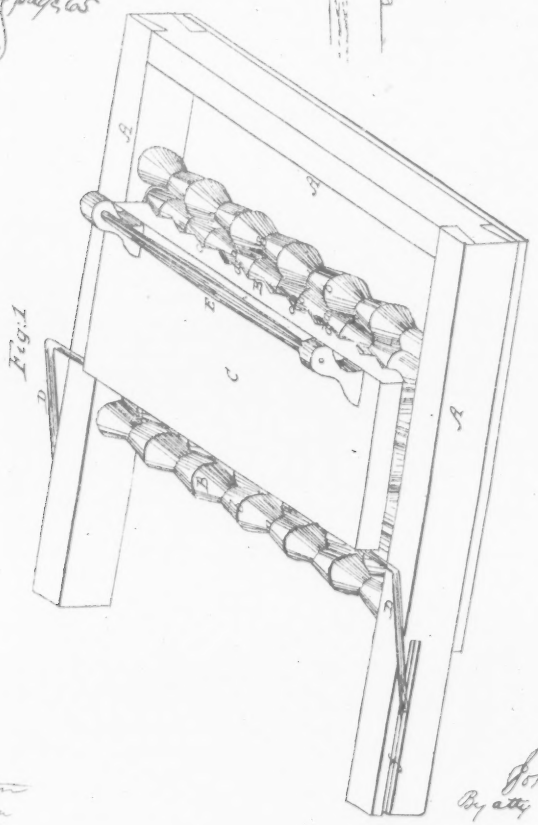


Fig. 1

Witnesses

Jno. D. Patton

Wm. M. Patton

Inventor

John. S. Lash

By atty. A.B. Stoughton

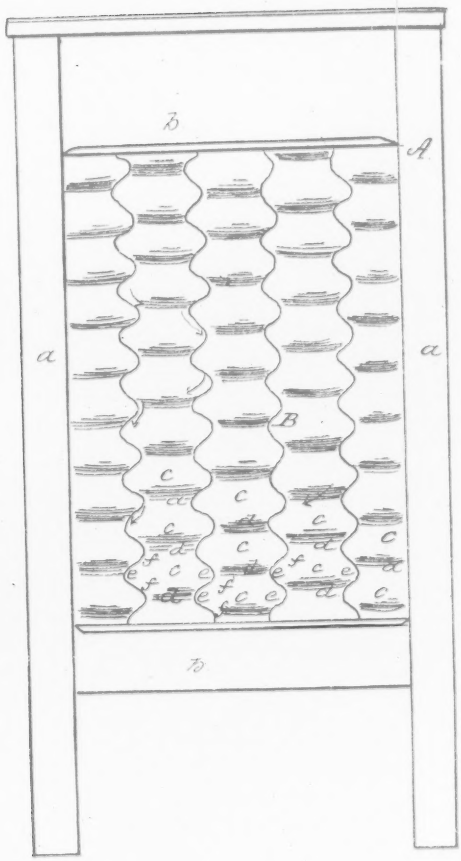
# Galusha & Safford,

## Washboard,

No. 18,965 Patented Dec. 29. 1857

No. 187
Duffetal
v.
Sterling Pump
Co.

Fig. 1.

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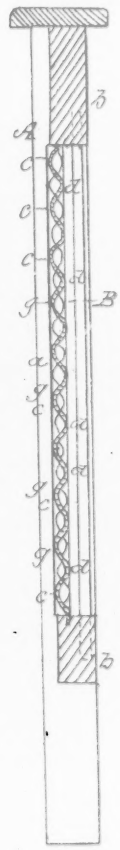


Fig. 4

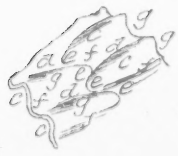

Fig. 3.

Gahusha G. Safford

Wash-Board.

No. 18,965. Patented Dec. 29, 1857.

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v.
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Fig: 1

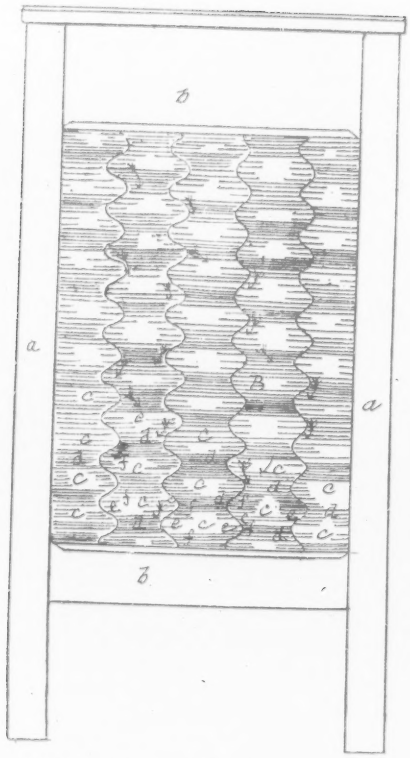



Fig: 2

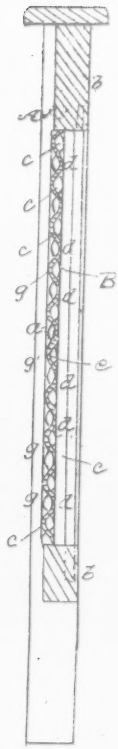



Fig: 4

Fig: 3

# J. Hyde

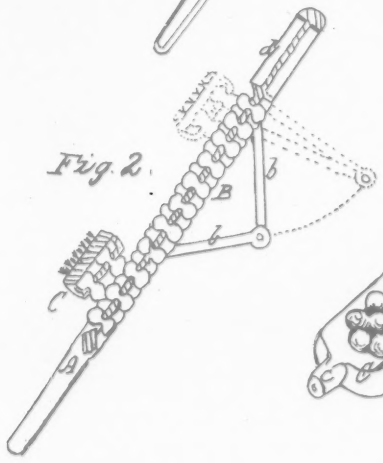
## Wash Board

No. 11426. Patented Aug. 1. 1854

No. 187 Buffetal Sterling Pump Co. } page 69.

Fig. 1.

Fig. 2.

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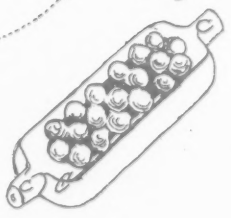

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Duff et al
v.
Sterling Pump Co.
Page 42.

G. L. Witsil

Wash Board.

No 43887. Patented Aug. 16. 1861.

Fig: 1

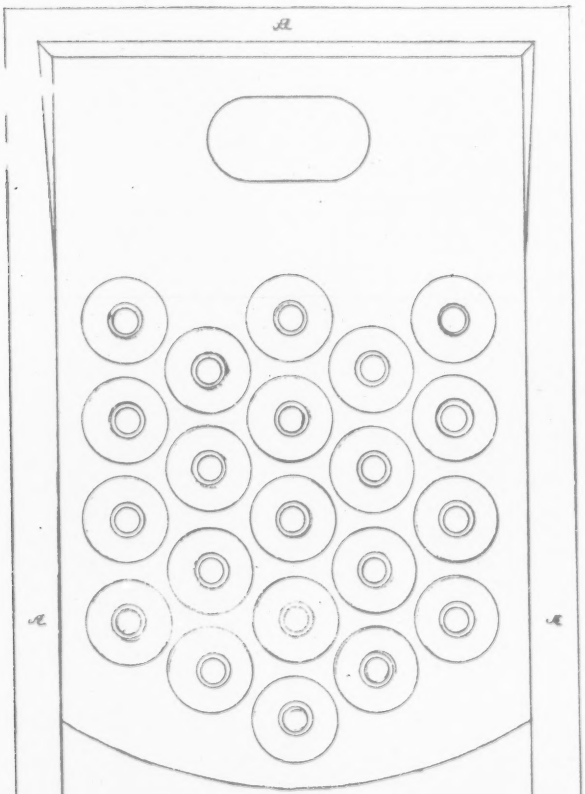
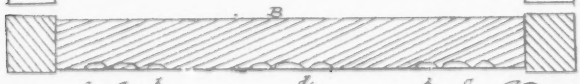



Fig: 2




Witnesses:

W. Albert Steel
Charles Howson

Inventor:

Henry Hirshen
Atty for G. L. Witsil

Bellas & Bowers, Exhibit 6.
O. W. B.
Wash Board.
N. P.

No. 94,551. Patented Sept. 7, 1869.

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Fig. 1.

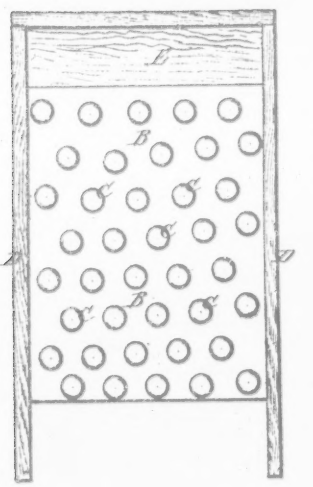



Fig. 2.

Witnesses:
Gustave Dittrich
Jno. C. Brooke

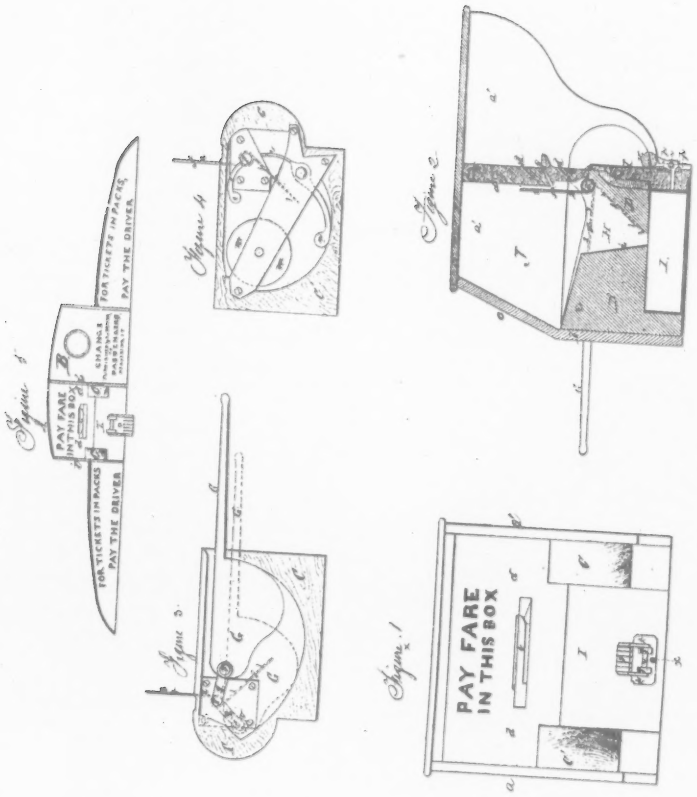
Inventors.
Wm. Bellas
C. Bowers
Per Munn & Co.
Attorneys.

J. B. Slawson,

Fare Box.

No. 4240. Reissued Jan. 24. 1871.

No. 238
Slawson
v.
R. R. Co.
} Page 80.




Witnesses
Thos Robt Lake
Jas Keene

Inventor
J. B. Slawson
by his atty
L. P. Hanney

No. 238.
Slawson
v.
R.R. Co.
Page 130

# J. Rodgers,
## Fare Box.

No. 19,446. Patented Feb. 23. 1858.

Fig 1.

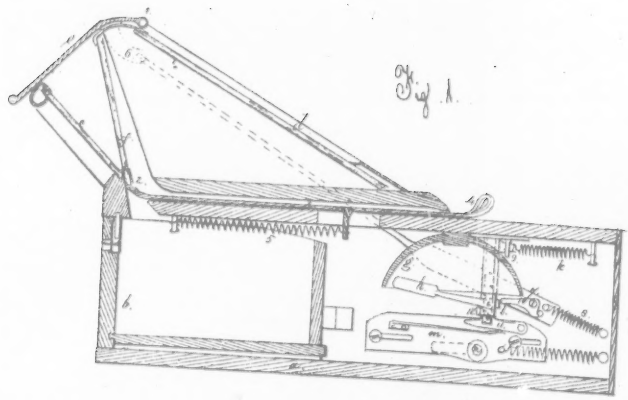
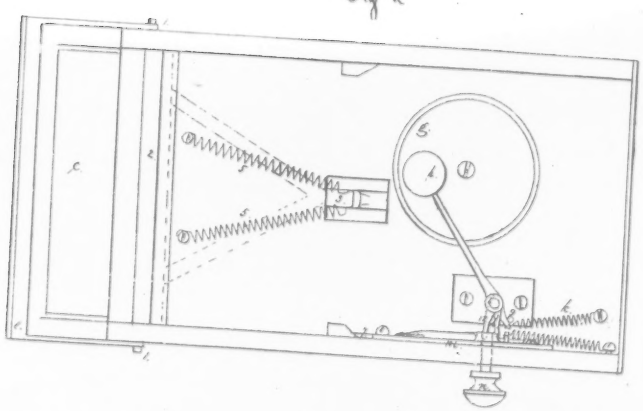


Fig 2.



Witnesses

James Rodgers

Lemuel W. Serrell

Thomas G. Harold

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Slawson
v.
R.R.Co.
page 87

(42.)

# JAMES F. WINCHELL.

## Improvement in Fare Boxes.

No. 121,920. Patented Dec. 12, 1871.

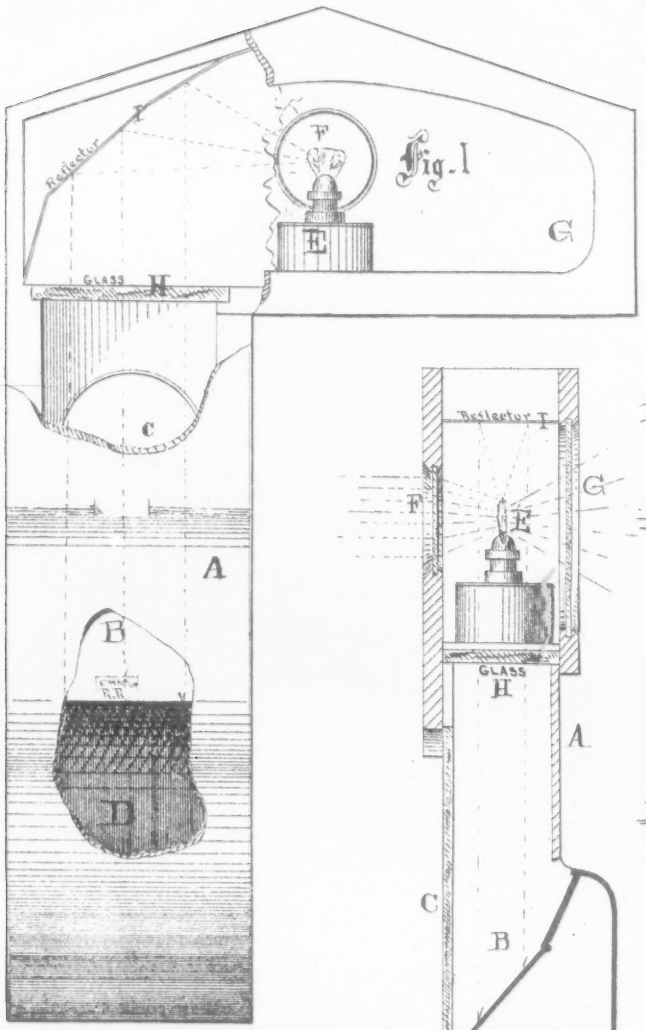


Fig. 1

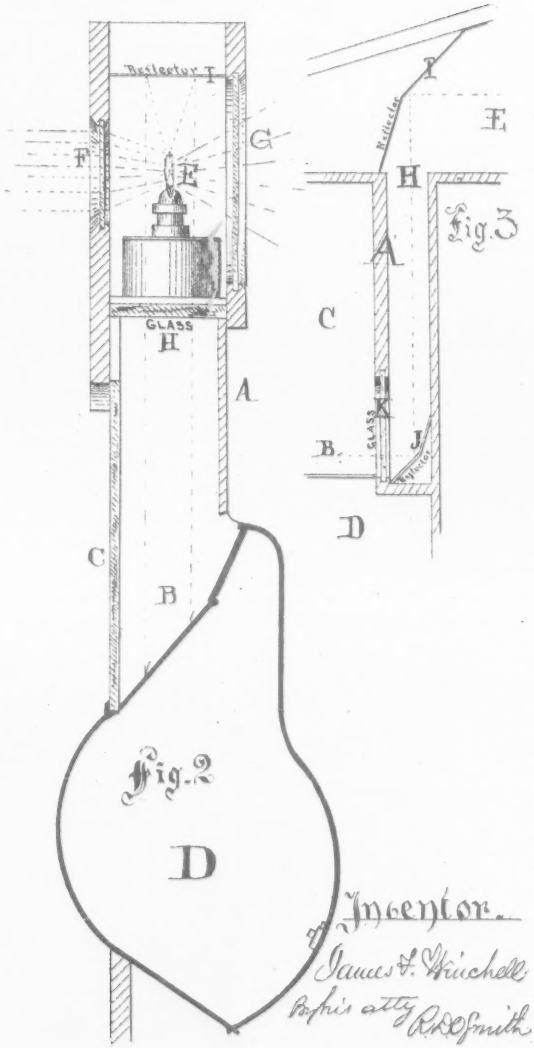


Fig. 2




Fig. 3

Witnesses.
Eli S. Prime,
J. C. Lyons

Inventor.
James F. Winchell
by his atty R. H. Smith

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page 118.

# I.S. Reeves.
## Fare Box.

No. 19,471. Patented Feb. 23, 1858.

Fig: 2.

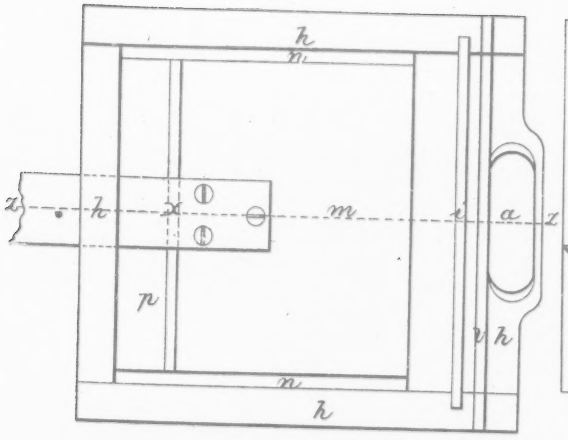



Fig: 3

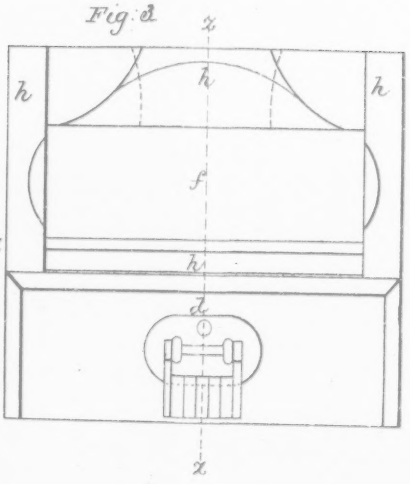
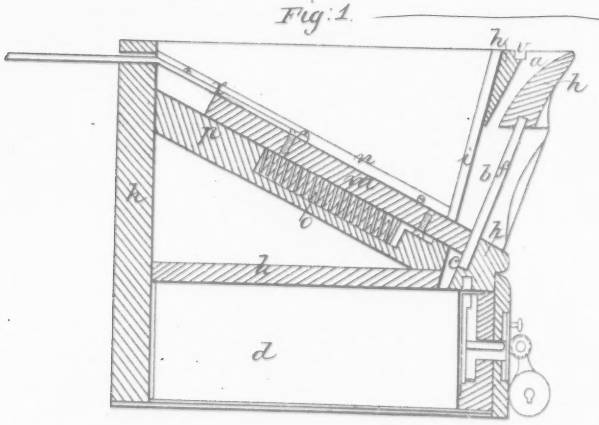


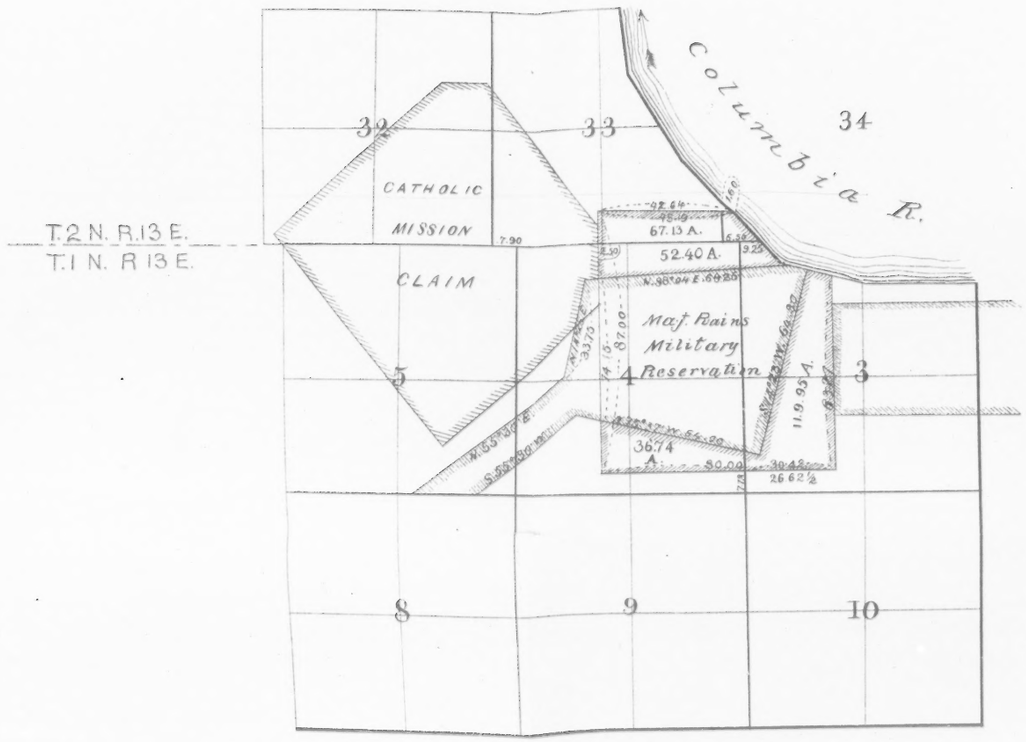

Fig: 1.



Exd
G. a J
G. H. F.

DIAGRAM OF THE LAND CONFIRMED TO THE METHODIST MISSION, DALLES CITY, OREGON.

No. 770 -
Missionary Society
M. E. Church
v.
Dalles City
} Pages 112




Land confirmed to Methodist Mission.

I hereby Certify that the above special plats showing that portion of the Methodist Mission claim lying outside of the exterior lines of Major Rains' Military Reservation at Dalles City Oregon is correct.

U.S. Surveyor Generals Office
Portland Oregon, June 17. 1875. (Signed) Ben Simpson
Sur. Gen. of Or.

Exd G.H.P.
G.A.T.

*References showing in detail the Military Reserve and Methodist Mission Land Claim.*

*Fort Dalles Reservation = 640 Acres, composed of*
*Methodist Mission Claim = 353 Acres, + 1 Rood, + 28 Poles.*
*and 286 Acres, + 2 Roods, + 32 Poles, otherwise unappropriated.*

ANALYSIS of the SURVEY

M B = Base Line = 213.5 Poles. Magnetic Variation 20° 54' E.

| | | | | | | |
|---|---|---|---|---|---|---|
| Missionary Military Reserve | | From A to B | 252.2 Poles | Angle | S. 14° 23' W. |
| | | " B to C | 256.7 " | " | N. 75° 37' W. |
| | | " C to D | 128.9 " | " | S. 53° 50' W. |
| | | " D to E | 53.6 " | " | N. 34° 10' W. |
| | | " E to F | 128.9 " | " | N. 55° 50' E. |
| | | " F to G | 135. " | " | N. 14° 23' E. |
| | | " G to H | 277 " | " | N. 88° 04' E. |
| | | " H to A | 9.09 " | " | E. |
| Missionary Claim. | | " A' to M | 220 " | " | S. |
| | | " M to M' | 320 " | " | W. |
| | | " M' to M'' | 380 " | " | N. |
| | | " M'' to M''' | 120 " | " | E. |
| Triangle M' R B | M' R B 190 1 1 | Side B M' | 213.5 " | " | W. |
| | | " B R | 288. " | " | N. 7° 37' E. |
| | | " M' R | 380.6 " | " | N. 41° 24' E. |
| Triangle M' P R | M' P R 196 3 2 | " M' P | 250 " | " | N. |
| | | " P R | 254.1 " | " | N. 82° 04' E. |
| | | " M' R | 380 6 " | " | N. 41° 24' E. |
| Triangle A B R | A B R 27 3 16 | " A B | 275.2 " | " | S. 14° 23' W. |
| | | " B R | 288 " | " | N. 7° 37' E. |
| | | " R A | 45 " | " | S. 47° 56' E. |
| Triangle H P R | H P R 22 3 22 | " P R | 254.1 " | " | N. 82° 04' E. |
| | | " R A | 45 " | " | S. 47° 56' E. |
| | | " P A | 277 " | " | N. 88° 04' E. |
| Triangle M' I B | M' I B 4 R P 36 1 39 | " M' I | 54.7 " | " | N. |
| | | " B I | 220.6 " | " | N. 75° 37' W. |
| | | " B M | 213.58 " | " | W. |
| Triangle L P G | L P G 2 0 10 | L P | 50 " | " | N. |
| | | P G | 13.4 " | " | N. 82° 04' E. |
| | | L G | 53.8 " | " | N. 14° 23' E. |
| Triangle I C L | I C L 15 2 8 | " I C | 36.1 " | " | N 75° 37' W. |
| | | " I L | 145.3 " | " | N. |
| | | " L C | 138.2 " | " | S. 14° 23' W. |

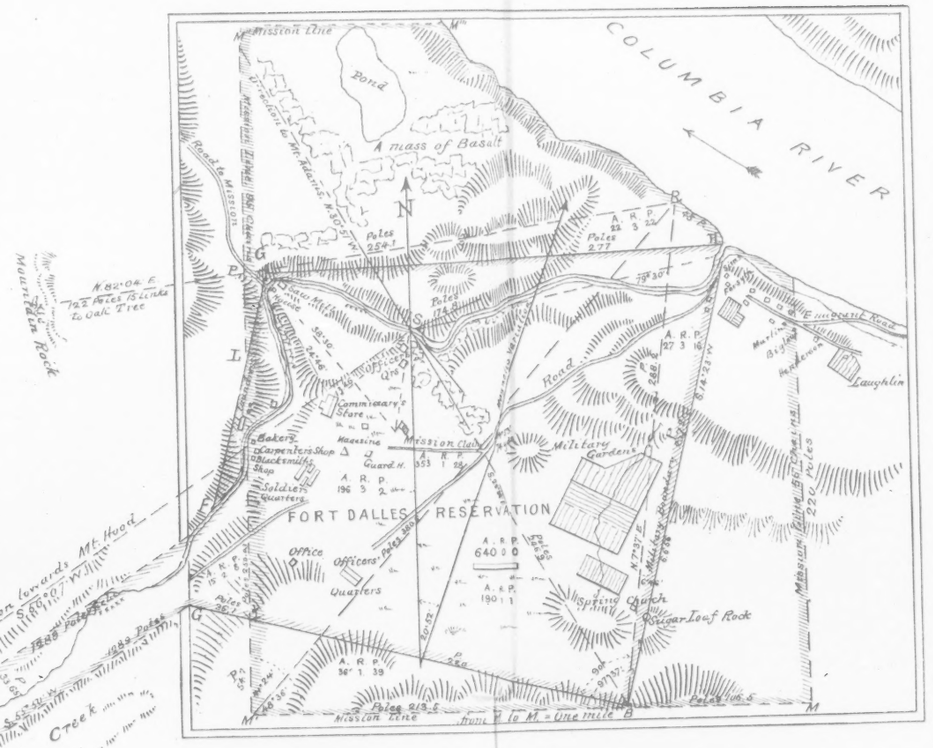
RECAPITULATION.

| | | Acres | Roods | Poles |
|---|---|---|---|---|
| Triangle M' R B | | 190 | 1 | 1 |
| " M' P R | | 196 | 3 | 2 |
| " A B R | | 27 | 3 | 16 |
| | | 414 | 3 | 19 |
| " H P R | | 22 | 3 | 22 |
| " M' I B | | 36 | 1 | 39 |
| " L P G | Subtract | 2 | 0 | 10 |
| | | 61 | 1 | 11 |
| Military Reserve Consists of | | 353 | 1 | 28 of Missionary Claim |
| P P | | 16 | 2 | 8 Triangle C L I |
| 1289 x 33.65 = | | 271 | 0 | 24 Parallelogram C O E |
| | | 640 | 0 | 0 |

U.S. Buildings
Mission Boundary
Military Reserve Boundary
Scale 100 200 300 400 Yards

MAP OF THE
UNITED STATES RESERVATION
AT FORT DALLES
OREGON

*Surveyed and delineated*
*by*
MAJ. G. K. KAINS.




*Fort Dalles Military Reserve Boundary.*

*Fort Dalles Reserve Boundary begins in a tangent line at the most Easterie extremity of the rock at the mouth of Mill Creek and proceeds S. 14° 23 W. 64 four pole chains and 30 links (True meter variation being 20° 54' E.) passing over the summit of Sugar Loaf Rock, back and eastward of the Church, to a rock on the brow of the cliff marked with a cross X, then intersecting the Methodist Mission line at a distance from its Southeast corner 20 chains and 62½ links and from thence in a right angle to this direction 64 chains, and from this point up to the rock S. 53° 50' W. 322 chains and 25 links to a tree (parallel with the first line) on which stands an oak witness tree 15 inches in diameter just where the road crosses the said line marked with three notches and a cross X above the same) along this line 12 chains and 70 links, and from thence on a parallel to the previous line N. 53° 50' E. 322 chains and 25 links, boundary a parallelogram 8 chains and 40 links wide) to a line parallel with the first line and distant 33 chains and 75 links from an oak witness tree 16 inches in diameter largely notched on the West and less so on the South side with a long vertical cut growing on the border of the mill pond and proceeding along this last line for that distance, and from the said oak tree N 88° 04 E. 69 chains and 25 links to the West side of the mouth of the Creek, and up the river 2 chains and 27 links to the beginning.*

*(Signed)* G. K. K.

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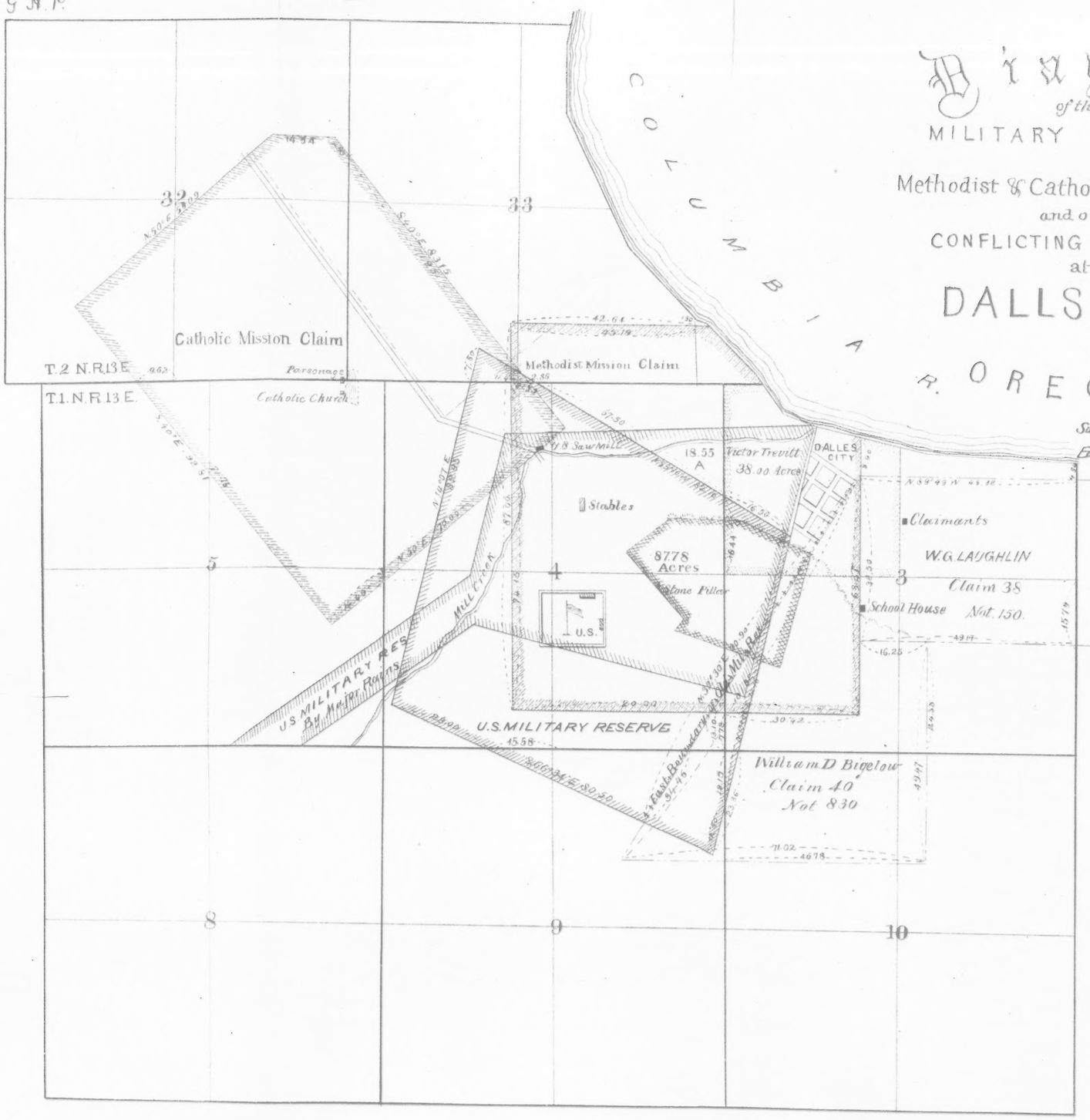
Dalles City
} page 107

*Copy*
*Bureau of Topl Engrs.*
*July 6th 1860.*
*(Signed) D Callahan*

*Copied in Q. M Gen'ls Office,*
*Washington D.C. Sept. 27th 1866.*
*Bk. 44, S. 286, a. 167, m. 280.*

Exd.
G.A.J.
G.H.P.

# Diagram
of the
MILITARY RESERVE
Methodist & Catholic Missions,
and other
CONFLICTING CLAIMS
at
# DALLS CITY,
R. OREGON




Surveyor Generals Office
Eugene City February 2nd 1861.
(Signed) H. W. Chapman
Surveyor Gen'l of Oregon

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} pages 109.

## Explanation

Catholic Mission Claim Shaded Green - thus - - -
Methodist Mission " " Purple - thus - -
U.S. Military Reserve " " Lake - thus - - -
U.S. M. Reserve by Major Ruins, light black, thus
Methodist Mission Improvement Blue thus - - -
Victor Trevitt's Claim Shaded Brown thus - - -
Laughlin & Bigelow's Claims Blueline thus
East Boundary of Old Military R. Yellow thus - - + + + +
Dalles City Claims the N. W. quarter of Sec 3

Scale 20 Chains to an inch

J 76.985